Jan. 4. 1892 Finlay.

143-47

RECORD, CASE No. 13,148.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 137.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY AND JOHN F. DILLON AND HENRY M. ALEXANDER, TRUSTEES, APPELLANTS,

vs.

JOHN D. PARKER, WALTER A. HAMLIN, THE NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD COMPANY, SAMUEL D. McENERY, GOVERNOR OF LOUISIANA, AND THE UNION TRUST COMPANY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 1, 1888.

Rec'd

Brown

RECORD, CASE No. 13,148.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 137.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY AND JOHN F. DILLON AND HENRY M. ALEXANDER, TRUSTEES, APPELLANTS,

vs.

JOHN D. PARKER, WALTER A. HAMLIN, THE NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD COMPANY, SAMUEL D. McENERY, GOVERNOR OF LOUISIANA, AND THE UNION TRUST COMPANY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Bill of complaint	1	1
Exhibit A—Act of mortgage, October 1, 1870	21	11
B—Map designating the general route of the N. O., Baton Rouge & Vicksburg R. R. from Baton Rouge to Vicksburg	28½	15
C—Certificate Commissioner General Land Office	29	15
Letter, Commissioner to register and receiver, New Orleans, November 29, 1871	29	15
Letter, Commissioner to register and receiver, Natchitoches, November 29, 1871	31	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 29, 1891.

	Original.	Print.
Exhibit D—Copy of bonds	33	17
E—Copy of bond No. 189	37	20
F—Lists of lands (omitted in printing)	41	—
G—Lists of lands (omitted in printing)	65	—
H—Lists of lands (omitted in printing)	78	—
I—Certificate of record of mortgage of October 1, 1870, in the parish of De Soto	103	22
J—Certificate of record of mortgage of October 1, 1870, in the parish of Sabine	104	23
K—Letter of M. C. Moseley to Kennard, Howe & Prentiss, May 21, 1886	105	23
L—Letter of A. E. Lemee to Kennard, Howe & Prentiss, May 20, 1886	106	24
M—Certificate of record of mortgage of October 1, 1870, in the parish of Grant	107	24
9 M—Statement of evidence adduced	110	25
Motion to compel defendants to appear	113	27
Order on defendants to appear	114	27
Order as to publication of order to plead	115	28
Motion to set demurrer for hearing	115	28
Demurrer of N. O. P. R'y Co. *et al.* to bill	116	28
Judgment *pro confesso* as to certain defendants	118	29
Order overruling demurrer	119	30
Answer of N. O. P. R'y Co. *et al*	120	31
Exhibit "E. B. W."—Testimony of E. B. Wheelock for defendants	137	38
Exhibit 1—Deed between N. O., B. R. & V. R. R. Co. and N. O. P. R'y Co., January 5, 1881	146½	43
2—Extract from minutes of N. O. P. R'y Co., February 3, 1881, &c.	149	44
3—Letter, E. B. Wheelock to W. H. Barnum, February 19, 1881, &c.	155	48
4 & 5—Letter, Secretary of Interior to the President, March 13, 1883, &c.	156	48
6—Letter, Commissioner General Land Office to E. B. Wheelock, May 22, 1883	160	51
7—Letter E. B. Wheelock to Commissioner General Land Office, May 23, 1883	165	53
L. G.[3]—Meeting of stockholders N. O. P. R'y Co., April 14, 1887	166	52
R[9]—N. O. Pacific R'y Co.'s land-grant and sinking-fund mortgage	169	55
R[10]—N. O. Pacific R'y Co.'s supplemental land-grant and sinking-fund mortgage	202	70
Replication	219	78
Cross-bill of N. O. P. R'y Co. *et al*	220	78
Order to plead, &c.	237	86
Order to plead as published in Shreveport Journal	238	87
Demurrer to cross-bill	241	88
Motion to set down demurrer to cross-bill	242	88

	Original.	Print.
Petition of Hamlin to be made co-complainant	243	89
Order granting petition of Hamlin	245	90
Stipulation as to Hamlin's pleadings, &c.	246	90
Withdrawal of plea of prescription and order thereon	247	91
Stipulation as to Hamlin's bonds	248	91
Supplemental answer of N. O. P. R'y Co. *et al.*	249	92
Consent and order to file supplemental answer	250	92
Respondents' Exhibit 8—An act to declare a forfeiture of lands granted to the N. O., B. R. & V. R. R. Co., &c.	250	92
8[1] & H—Letter from Commissioner General Land Office to register and receiver at New Orleans, June 6, 1887	254	94
Two maps offered by defendants, marked L. G.[3]	259 *a* & *b*	96
Consent of counsel for Hamlin to submit cause	260	97
Petition and order making Hamlin's administrator party	261	97
Minutes of court	263	98
Order *pro confesso*	263	98
Order sustaining demurrer	263	98
Supplemental answer filed	264	98
Submission	264	98
Judgment ordered	264	99
Appeal allowed, &c.	265	99
Order sustaining demurrer and dismissing cross-bill	266	99
Decree in favor of John D. Parker	267	100
Walter A. Hamlin	270	101
Order allowing appeal	278	108
Waiver of citation on behalf of Parker	275	108
Citation	277	108
Bond	279	108
Certificate to record	289	106
Minutes of the court	291	107
Order to plead	291	107
Demurrer overruled	291	107
Judgment *pro confesso*	291	107
Supplemental answer filed	293	108
Submission	293	108
Judgment ordered	294	108
Appeal allowed, &c.	294	109
Clerk's certificate	295	109
Agreement as to patents	296	109
Citation and proof of service	303	111
Agreement as to transcript	305	112
Citation and proof of service	308	113
Assignment of errors	310	114
Stipulation to omit portion of record in printing	314	115

1 *Bill of Complaint.*

To the honorable the judges of the circuit court of the United States for the fifth circuit and western district of Louisiana:

John D. Parker, a citizen of the State of Illinois, for himself and for all parties holding bonds & coupons similar to those herein set forth, brings this his bill of complaint against the New Orleans, Baton Rouge & Vicksburg Railroad Company, a citizen of the State of Louisiana; against the New Orleans and Pacific Railroad Company, a citizen of the State of Louisiana; against the Union Trust Company of New York, a citizen of the State of New York, and against John F. Dillon and Henry M. Alexander, both citizens of the State of New York, and against Sam'l D. McEnery, now governor of and a citizen of the State of Louisiana.

And thereupon your orator, complaining, says that the legislature of Louisiana at its session, A. D. 1869, by act No. — of said session, approved Dec'r 30th, A. D. 1869, incorporated the said New Orleans, Baton Rouge & Vicksburg Railroad Company, creating George W. Cochran, Thomas C. Bates, J. P. Sullivan, Michael Hahn, J. H. Oglesby, J. S. Scott, and George W. Comstock, their associates and successors, a body corporate in deed and in law, to be known by the name, style, and title of the New Orleans, Baton Rouge & Vicksburg Railroad Company.

That by said act of the legislature said company was authorized and empowered to lay out, construct, and operate a railway from any point on the line of the New Orleans, Jackson & Great Northern Railroad Company within the parish of Livingston, running from thence to any point on the boundary line dividing the States of Louisiana and Mississippi, by such route as the company may

2 deem most direct and practicable with a view of continuing & completing said railroad to the city of Vicksburg, in the State of Mississippi, and also a branch railway from any point on its main line to the city of Baton Rouge, and such other branches as the company may deem proper from their main line to other points on the Mississippi river within the State of Louisiana; and further authorizing and empowering said company to acquire by grant or purchase other railroads, parts of railroads, rights of way, & franchises thereto appertaining, to be, when so acquired, merged into said New Orleans, Baton Rouge & Vicksburg Railroad Company; and further authorizing and empowering said railroad company to construct, maintain, and use such other branch railroads & tracts as it may find necessary & expedient to own & use for the purpose of connecting its railroad with the railroad of other companies and with mines & manufactures in the State of Louisiana.

Your orator avers that by said act the stock of said company was fixed at one million of dollars, with power to increase same to five millions of dollars; that its domicil was fixed at New Orleans, in the State of Louisiana; that the business of said corporation was to be conducted by the corporators or a majority thereof until five hundred thousand dollars of the stock of said company had been

subscribed and five per cent. thereof paid to the treasurer of said company, when a board of directors were to be elected, and thereafter the business of said company was to *to* be conducted by a board of directors authorized to make such rules, regulations, and by-laws for the management of the business of the company as they might deem expedient.

3 That by said act there was granted to said company the right of way through any and all lands belonging to the State of Louisiana, and said company was authorized and empowered to expropriate any lands necessary & proper for the uses & construction of its railways.

That the company was authorized and empowered to borrow money or to purchase property upon its own credit for the purposes of constructing & maintaining said railroad or establishing continuous and connecting lines of railroad, and, in evidence of its indebtedness, was authorized to issue its corporate bonds or promissory notes, bearing interest not to exceed eight per cent., &, to secure the payment of such bonds or notes, was authorized to mortgage its railroads, its capital stock, its corporate franchises, and its real & personal property or any part thereof owned by said company at the time of executing such mortgage or which might thereafter be by said company acquired, and the board of directors were authorized to dispose of, sell, and negotiate such bonds or notes, through the president or other officers or agents, at such rates and for such prices as in the judgment of the company or its board of directors might seem proper.

And your orator further avers that by said act said company was authorized to make and issue its first-mortgage bonds, such bonds and the mortgage securing same to be a prior lien to the extent of twelve thousand five hundred dollars a mile, payable in — or currency, or two thousand five hundred pounds sterling, bearing interest not to exceed eight per cent. per annum, payable semi-annually, upon each and every mile of the branch & connecting rail-

4 roads within the State of Louisiana, including the right of way, road-bed, rails, depots, buildings, stations, shops, machinery, tools, engines, cars, and real and personal estate within the State of Louisiana, appurtenant to or necessary for the operation of said main line of railroad and its branch & connecting roads owned by the company at the date of said mortgage or which may be acquired by it thereafter, and of the franchises & privileges of said company, the principal of such first-mortgage bonds not — be payable in less than forty nor more than fifty years from their date unless in case of default of payment of interest thereon.

And your orator further avers that by the terms of said act said company was authorized and empowered to make and issue its bonds, to be known as second-mortgage bonds of the New Orleans, Baton Rouge & Vicksburg Railroad Company, guaranteed by the State of Louisiana, to an amount not exceeding in the aggregate twelve thousand five hundred dollars for each & every mile in length of the main line of its railroad & franchises in the State of Louisiana, payable to the State — Louisiana or bearer, bearing in-

terest not exceeding eight per cent., payable semi-annually, to be secured by a mortgage on all franchises & property of the company held & owned by the company at the date of the mortgage or which it might thereafter acquire, such mortgage to be subject & subordinate to a prior lien in favor of the first-mortgage bonds aforesaid, and by said acts of the legislature the State of Louisiana guaranteed the payment of the principal of said second-mortgage bonds when due and of the interest as it accrued.

And your orator further avers that by said acts the powers usually conferred on corporations were granted to said company, and
5 other and further powers, rights, franchises, etc., etc., were also granted to said company; and your orator further avers that by said act it was provided that said company might accept the terms, conditions, and provisions of said act at any time within one year from the date of its passage and approval by a written acceptance, signed by a majority of the directors of the company, addressed to the governor of the State of Louisiana, and that in case of such acceptance, the said company was to be entitled to the benefit of said act, and was to possess and enjoy the rights and franchises thereby granted as binding contracts, not to be impaired, disturbed, or modified by subsequent legislation; all of which appears by reference to an authentic copy of said act of the said legislature, which is hereto annexed and made part hereof.

And your orator further avers that said parties named as incorporators in said act thereupon assumed charge of the business of said company, opened books of subscription, received subscriptions to the capital stock to the extent of five hundred thousand dollars, collected five per cent. thereof, and thereafter called a meeting of the stockholders, at which a board of directors, duly qualified, were duly elected, and thereafter such board of directors assembled and organized, electing Thos. C. Bates president of the company, and thereupon the said board of directors, with the officers by it elected, assumed the control and management of the business of said company.

Your orator avers that within the time specified by said act of the legislature said company formally and by written instrument, signed by a majority of the directors of said company and addressed to the governor of Louisiana, accepted the terms, conditions, and provisions of said act.

6 Your orator further avers that said company, through its board of directors, officers, and agents, made preparation for the construction of its railroads, main line and branches, and commenced the construction of same—among other things, caused surveys to be made—and located the main line and the line of branch and connecting railways, and, among others, located and surveyed a branch line from the city of Baton Rouge to Shreveport, Louisiana, to connect its main line with the Texas and Pacific Railway, which said branch and connecting line so located commenced at Baton Rouge, extending thence through the parishes of West Baton Rouge, Iberville, Point Coupee, St. Landry, Avoyelles, Rapides, by way of Alexandria, Natchitoches, and De Soto, to Shreveport, Louis-

iana, and also another branch road, commencing on the main line in the parish of East Baton Rouge and extending through the parishes of Ascension, St. James, St. John the Baptist, St. Charles, and Jefferson to the Mississippi river, at New Orleans.

Your orator avers that the said board of directors caused to be engraved 6,250 first-mortgage construction bonds, each for one thousand dollars, bearing date October 1st, A. D. 1870, payable on the 1st day of October, A. D. 1910, to the Union Trust Company of New York or bearer, with eighty coupons thereto attached, each for forty dollars, payable to bearer, for semi-annual interest on said bonds, it being recited in the bonds "that the payment at maturity of the principal and interest of this whole series of bonds is secured by a first mortgage on the entire main line and branches of the railroad of said company within the State of Louisiana, including all the right of way, road-beds, rails, depots, stations, shops, build-
7 ings, machinery, tools, engines, cars, and real and personal estate within the State of Louisiana appurtenant to or necessary for the operatian of the main line or branches of the railroad owned by said company at the date of the mortgage given to secure the payment of said whole series of bonds, or which may be acquired by it thereafter, and of the corporate franchises and privileges of said company granted by the State of Louisiana or by act of Congress relative to the construction, operation, and use of said main line of railroad and its branches within the State of Louisiana.

And your orator avers that, acting under authority of the said board of directors, said bonds were duly signed by Thomas C. Bates, president of the company, countersigned by Porter Farley, its secretary, and verified by the seal of said company, and that said coupons so as aforesaid attached to said bonds were signed by said secretary, acting under authority of the said board of directors.

Your orator further avers that on the 1st day of October, A. D. 1870, the said company, through its said president, Thomas C. Bates, acting under and by virtue of resolutions of the board of directors of said company, to secure the payment of said bonds and coupons, mortgaged and hypothecated to the Union Trust Company of New York, a corporation chartered by the State of New York, and having its domicile in the city of New York, for the benefit of whomsoever should from time to time hold the aforesaid bonds and coupons or any one or more of same, the whole of the main line of railroad and its branches and connecting lines, including a branch railroad commencing at the city of Baton Rouge and extend-
8 ing thence through the parishes of West Baton Rouge, Iberville, Point Coupee, St. Landry, Avoyelles, Rapides, by way of Alexandria, Natchitoches, and De Soto to Shreveport, and also a branch road commencing on the main line of said road in the parish of East Baton Rouge and extending through the parishes of Ascension, St. James, St. John the Baptist, St. Charles, and Jefferson to the Mississippi river, at the city of New Orleans, together with all the right of way, road-bed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, tender-, and other rolling stock, and also real and personal estate within the State of Louisiana, owned

by the said company at the date of the mortgage or which may be acquired by it thereafter, appurtenant to or necessary for the operation of said main line of said railroad or any of said branches connected with the said main line or to be connected therewith; also all other property, real and personal, of every kind and description whatsoever and wheresoever situated, in the State of Louisiana, which is now owned or which shall hereafter be acquired by the said company, and which shall be appurtenant to or necessary or used for the operation of said main line of railroad or any of said branches; also all the tenements, hereditaments, and appurtenances thereunto belonging, and all of the estate, right, title, and interest, legal and equitable, of the said company and its successors and assigns therein, together with the corporate franchises and privileges of said company at any time granted or to be granted by the State of Louisiana relative to the construction, operation, and use of said railroad within said State.

And your orator avers that in said mortgage it was understood, covenanted, and agreed that should the company at any time be in default in paying the aforesaid bonds or coupons or any portion thereof, the holder or holders of such bonds and coupons shall have the right without further delay to institute legal proceedings for the recovery of his or their claim and for the foreclosure of the mortgage in any court of competent jurisdiction.

9

That said mortgage was executed in the State of Louisiana and under the laws of said State imported a confession of judgment.

That it was accepted by said Union Trust Company for the benefit of all future holders of said bonds and coupons.

That it was duly executed and signed before a notary public of the city of New Orleans, duly commissioned and qualified, in the presence of two competent witnesses, and was and is, under the laws of said State, an authentic act.

That the said act of mortgage was duly recorded, as required by the laws of Louisiana, in the parishes of Orleans, Jefferson, St. Charles, St. John the Baptist, St. James, Ascension, Iberville, West Baton Rouge, St. Landry, Avoyelles, Rapides, Natchitoches, Sabine, Vernon, De Soto, Caddo, Bossier, Webster, Claiborne, Bienville, Red River, Winn, Catahoula, and Calcasieu. An authentic copy of said act of mortgage is herewith annexed as part hereof.

Your orator avers that said company, by said act of mortgage, mortgaged and hypothecated to any holder or holders of said bonds and coupons or any part of same all the property and rights of every kind owned and held by said company at the date of said mortgage or which it might thereafter acquire, and that after said mortgage was so as aforesaid duly recorded said company could not sell, transfer, assign, or incumber said property and rights so mortgaged or any part thereof to the prejudice of said mortgage, nor could any one acquire same or any part thereof except as subject to said mortgage.

10

Your orator further avers that said bonds and coupons were engraved, executed, and signed as aforesaid and said mortgage was

made and executed to secure payment of same as aforesaid in order that said company might sell said bonds and with proceeds therefrom accruing construct its lines of railroads; that said company, acting through its board of directors and under resolutions adopted by said board, placed said bonds in the market, offered same for sale, and disposed of a number of said bonds for a valuable consideration. The number of bonds so sold and disposed of by said company your orator is unable to state accurately, but he is informed and believes and so charges the fact to be that the number of bonds so sold and disposed of did not exceed fifteen hundred.

Your orator further avers that of the bonds so as aforesaid sold and disposed of by the said New Orleans, Baton Rouge and Vicksburg Railroad Company the said company has taken up and retired one thousand, and that not more than five hundred of said bonds are now outstanding obligations of said company.

Your orator avers that by an act of the Congress of the United States approved March 3d, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," the Texas and Pacific Railroad Company was incorporated and invested with certain rights, powers, franchises, etc., etc., and by said act the Congress of the United States, for the purpose of aiding in the construction of the
11 railroad and telegraph line provided for by said act, granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as such line may be adopted by said company through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States and to which a pre-emption claim may not have attached at the time the line of said road is definitely fixed; and said act further provided that in case any of said lands shall have been sold, reserved, occupied, pre-empted, or otherwise disposed of other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the alternate sections first above named and not including the reserved numbers.

And your orator further avers that by the said act of Congress it was provided that the New Orleans, Baton Rouge & Vicksburg Railroad Company, chartered by the State of Louisiana, should have the right to connect by the most eligible route, to be selected by said company, with the said Texas and Pacific Company at its eastern terminus, and should have the right of way through the public lands to the same extent granted to the Texas and Pacific Railroad Company, and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its
12 eastern terminus, there was by said act granted to said company, its successors and assigns, the same number of a

sections per mile in the State of Louisiana as were by said act granted in the State of California to said Texas Pacific Railroad Company. An authentic copy of said act of Congress is hereto annexed and made part of this bill.

And your orator further avers that subsequently, to wit, in the year 1872, the legislature of Louisiana, at its session of said year, by act No. 100 of said session, authorized and empowered the said New Orleans, Baton Rouge and Vicksburg Railroad Company to construct a continuous line of railroad from the city of New Orleans to the city of Shreveport or perfect railroad communication with the Texas Pacific railroad. An authentic copy of said act is hereby annexed and made part hereof.

And your orator further avers that by an act of Congress of May 2nd, 1872, the Texas & Pacific Railway Company was authorized and required to construct, maintain, control, and operate a road between Marshall, Texas, and Shreveport, Louisiana, or control or operate any existing road between said points. A copy of said act is hereto annexed as part hereof.

Your orator avers that the grant so as aforesaid made by the Congress of the United States was a present grant, and vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company title to the lands so granted by the act of Congress aforesaid; which said lands so vested became and were immediately subject to the mortgage so as aforesaid granted and executed by said company to secure the payment of its first-mortgage bonds and coupons so as
13 aforesaid executed, issued, and disposed of by said company.

Your orator further avers that on or about November 11th, A. D. 1871, said New Orleans, Baton Rouge & Vicksburg Railroad Company filed in the General Land Office of the United States a map designating the general route of its road from Shreveport by way of Alexandria to Baton Rouge, and thereupon the withdrawal of the public lands along the same was ordered in accordance with the provisions of the act of Congress aforesaid.

Your orator further avers that on the faith of said acts of the legislature of Louisiana, of said acts of Congress and of the action taken thereunder, of the bonds with coupons attached so as aforesaid issued and sold, and of the mortgage to secure payment of said bonds and coupons so as aforesaid made, executed, and recorded, he, in good faith, before maturity, and for a valuable consideration, acquired and now holds two of said bonds, with coupons for interest attached, which bonds are numbered respectively 1488 and 189, and are hereto annexed and made part of this bill.

& your orator further avers that on or about the fifth day of January, A. D. 1880, the said New Orleans, Baton Rouge and Vicksburg Railroad Company sold, transferred, assigned, and on or about the fifth day of January, A. D. 1880, the said New Orleans, Baton Rouge & Vicksburg railroad sold, transferred, assigned, & delivered *delivered* to the New Orleans and Pacific Railroad Company, a corporation created by and existing under the — State of

(All erased is strictly a copy.)

Louisiana, a citizen of said State, and domiciliated in the city of New Orleans, all of the right, title, and interest in and to the lands so as aforesaid vested in said New Orleans, Baton Rouge
14 and Vicksburg Railroad Company; but your orator avers that, said act of mortgage having been as aforesaid duly recorded anterior to the date of said transfer and anterior to the date of any registry or record of said transfer, the said sale and transfer was made subject to the mortgage aforesaid, and the lands sold and transferred were acquired by the New Orleans and Pacific Railroad Company subject to said mortgage.

Your orator further avers that on or about the 3rd March, A. D. 1885, patents of the United States for 679,287.64 acres were issued, under authority of the acts of Congress aforesaid, to the New Orleans, Baton Rouge and Vicksburg Railroad Company.

Your orator avers that the said lands for which patents were so issued constitute and are a portion of the lands so as aforesaid granted to and vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company; that said lands were and are subject to the mortgage aforesaid, and that to enforce payment of the amount of the coupons so due him as aforesaid he is entitled to have said mortgage foreclosed and to have said lands sold according to law. He avers said lands are situated in the parishes of De Soto, Sabine, Natchitoches, Vernon, Rapides, Avoyelles, St. Landry, Calcasieu, Catahoula, Winn, Red River, Bienville, and Bossier, in the State of Louisiana, and in the western district of Louisiana, and that this honorable court has jurisdiction over the matters herein presented.

He annexes hereto and makes part hereof duly certified lists of said lands, giving a full description of same. Your orator avers that he is informed and believes, and so charges the fact to be,
15 that payment of the matured coupons on & attached to said bonds has been in vain demanded, and that said company failed, neglected, & refused to pay same.

Your orator further avers that said New Orleans, Baton Rouge & Vicksburg Railroad Company has not now and has not had for years any office either in the city of New Orleans, its legal domicile, or elsewhere; that said company is insolvent, has no moneys wherewith to pay its debts, and no means whereby to obtain same, and has utterly failed, neglected, and refused to make any provision whatever for the payment of said coupons or its other obligations.

He avers that thirty of the coupons on & attached to each of said bonds are now due and unpaid, each coupon being for the sum of forty dollars, aggregating the sum of twenty-four hundred dollars; and he avers further that he is entitled to legal interest on each of said coupons from the date on which it matured & to have said mortgage foreclosed to satisfy the amount due him.

Your orator further avers that the said New Orleans, Baton Rouge & Vicksburg Railroad Company has not now and has not for years had in the State of Louisiana any officer or agent upon whom service may be made; that William H. Barnum, a citizen of the State of Connecticut and a resident of the city of Hartford, is the president of said company; that the president is by the charter of

said company the officer upon whom service is to be made, and that your orator is entitled to have said company compelled to answer hereto by service upon said president or by publication or both, as your honors may direct.

16 Your orator avers that the New Orleans & Pacific Railroad Company is not an inhabitant of said western district of Louisiana; that its domicile is the city of New Orleans, in the eastern district of the State of Louisiana, and that your orator is entitled to have said company compelled to answer hereto by service to be made as your honors may direct, or by publication or by both, as your honors may deem proper.

Your orator further avers that on the 28th December, A. D. 1870, Thomas C. Bates, then president and assuming to act for the New Orleans, Baton Rouge & Vicksburg Railroad Company, made and executed a mortgage in favor of the governor of the State of Louisiana, as trustee, to secure the payment of 6,250 second-mortgage bonds, each for $1,000.00, with interest coupons attached, which said mortgage embraced the same property described and specified on the mortgage given by said company to secure its first-mortgage bonds, but your orator avers said second mortgage was subsequent — subordinate to said first mortgage; that said company never issued any of said second-mortgage bonds, and that the mortgage given to secure same has been erased, cancelled, & extinguished.

And your orator further avers that on the 4th September, A. D. 1872, Calvin H. Allen, assuming to act as president of and for said New Orleans, Baton Rouge & Vicksburg Railroad Company, executed a mortgage in favor of the Union Trust Company of New York on the same property so as aforesaid mortgaged to secure payment of its first-mortgage bonds and coupons, which said mortgage of Sept'r 4th, 1872, was executed to secure payment of 12,000 bonds, each for $1,000, with coupons for interest attached, styled "first-

17 mortgage seven per cent. land-grant & sinking-fund gold bond," but your orator avers said mortgage was subsequent and subordinate to said first mortgage; that said company never issued any of said "first-mortgage seven per cent. land-grant & sinking-fund gold bonds," and that if any of same are now outstanding they are not and never were valid obligations of said company.

And your orator further avers that by acts of mortgage bearing date April 17th, 1883, and January 5, A. D. 1884, the New Orleans & Pacific Railroad Company made and executed in favor of John F. Dillon and Henry M. Alexander, of the city of New York, trustees, a land-grant and sinking-fund mortgage on all the lands acquired by said company from the New Orleans, Baton Rouge & Vicksburg Railroad Company to secure the payment of land-grant & sinking-fund bonds, limited to an issue of two dollars and fifty cents per acre on the number of acres of said land, but your orator avers that said mortgage in favor of John F. Dillon & Henry M. Alexander is subsequent and subordinate to the mortgage so as aforesaid given and executed by the New Orleans, Baton Rouge &

Vicksburg Railroad Company to secure the payment of its first-mortgage bonds and coupons.

Your orator further avers that the said Union Trust Company of New York, John F. Dillon, Henry M. Alexander, and S. D. McEnery are not inhabitants of said western district of Louisiana, and that your orator is entitled to have said parties compelled to answer hereto by service, by publication, or by both, as your honors may direct.

18 To the end, therefore, that your orator may have that relief which he can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, and that he may have judgment against the New Orleans, Baton Rouge and Vicksburg Railroad Company for the amount of said coupons so as aforesaid due and by him held and owned, and that the said lands hereinbefore described be held subject to the mortgage to secure the payment of said bonds and coupons as hereinbefore set forth, and that said mortgage be recognized and enforced, and that said lands be sold to pay and satisfy the amounts so due him, and that your orator may have such further and other relief as the nature and circumstances of the case may require and to your honors may seem meet—

May it please your honors to grant unto your orator writs of subpœna to be directed to the said New Orleans, Baton Rouge and Vicksburg Railroad Company, the Union Trust Company of New York, Samuel D. McEnery, John F. Dillon, and Henry M. Alexander, commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to

19 appear before this honorable court and then and there full, true, direct, and perfect answer make, but not upon oath or affirmation, to all and singular the premises, and, further, to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

And, in the event the said parties defendant or any one of them are not found in the said western district, may it please your honors to make an order herein directing said defendants and each of them to appear, plead, answer, or demur hereto by a day certain to be by your honors designated, and may it please your honors to direct that service be made on said defendants in such manner, by publication *and* otherwise, as to your honors may seem proper.

And your orator will ever pray.

(Sig.) JOHN D. PARKER.
(Sig.) LEONARD, MARKS & BRUENN,
(") ROUSE & GRANT,
Solicitors for Complainant.

THE STATE OF LOUISIANA, }
Parish of Orleans. }

Personally appeared before me, undersigned authority, A. H. Leonard, who, being duly sworn, deposes and says he is one

20 of the solicitors of the complainant, John D. Parker, who is absent from the State of Louisiana; that he has read the

above and foregoing bill, and that the same is true of his own knowledge except as to matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

(Sig.) A. H. LEONARD.

Sworn to and subscribed before me this 11th February, A. D. 1886.

[Seal M. Voorhies, Notary Public, P'sh of Orleans.]

(Sig.) M. VOORHIES,
Notary Public.

Endorsement: C. C., western district Louisiana. No. 94. John D. Parker *vs.* N. O., B. R. & V. R. R. Co., N. O. & P. R. R. Co., *et als.* Bill of complaint. Filed Feb. 15th, '86. E. J. Nolan, d'y cl'k. Leonard, Marks & Bruenn, Rouse & Grant, solicitors.

21 EXHIBIT "A."

STATE OF LOUISIANA, }
City of New Orleans. }

B. 89, fo. 337.

Personally came and appeared before me, Thomas Jefferson Beck, a notary public, duly commissioned and sworn and acting in and for the city of New Orleans, parish of Orleans, State of Louisiana, Thomas C. Bates, president of the New Orleans, Baton Rouge & Vicksburg Railroad Company, a corporation duly incorporated by the laws of the State of Louisiana and having its domicil in the aforesaid city of New Orleans, the said Bates herein acting under and by virtue of certain resolutions passed at a meeting of the board of directors of said company held on the thirtieth day of September, A. D. 1870; and also came and appeared the Union Trust Company of New York, a corporation chartered by the State of New York & having its domicil & place of business in the city of New York, herein appearing for the purpose of accepting the mortgage & hypothecation herein granted & given by & through Frank N. Butler, of the city of New Orleans, the agent & mandatory of the said Union Trust Company of New York, duly appointed under and by virtue of a certain power of attorney made & executed before Charles Nettleton, Esq., of the city of New York, a commissioner of the State of Louisiana, bearing date on the 1st day of September, A. D. 1870, hereto annexed and made part of this act.

And the said Thomas C. Bates, president as aforesaid, did declare and say that the New Orleans, Baton Rouge & Vicksburg Railroad Company, through its board of directors lawfully assembled and in accordance with the charter of said company and the laws of the State of Louisiana in such cases made & provided, had
22 directed to be issued a series of first-mortgage bonds of the said company, in all six thousand two hundred & fifty bonds, each in the alternative for the sum of one thousand dollars United

States gold coin or two hundred pounds sterling, at the option of the holder, the said bonds to be numbered from 1 to 6250, inclusive, to bear date on the first day of October, A. D. 1870, and to be made payable to the said Union Trust Company of New York or bearer in forty years from the date of such bonds, in United States gold coin in the city of New York or in sterling in the city of London, England, at the option of the holder of each of said bonds, and to bear interest at the rate of eight per cent. per annum, payable semi-annually, on the first days of April and October in each year, either forty dollars in United States gold coin in the city of New York or eight pounds sterling in the city of London, England, at the option of the holder, as specified in the coupons attached to said bonds; the whole amount of principal and interest to be payable free of government tax and without any deduction or imposition whatever, the said bonds, with accompanying coupons, being identified with this act by the paraph of me, the said notary, affixed to the said bonds.

And in order to secure to the persons and bodies corporate who have or shall become the holders of the said bonds and coupons the prompt payment of the principal and interest therein stipulated, according to the tenor & effect, and for and in consideration of one dollar to the said company paid by the aforesaid Union Trust Company of New York, and for other valuable considerations by the said company received, the said Thomas C. Bates, president
23 of the said company, acting in and for its behalf and under its authority and instructions, has mortgaged and hypothecated and does hereby mortgage and hypothecate in favor of the said Union Trust Company of New York and for the benefit of whomsoever shall from time to time hold the aforesaid bonds and coupons of interest or any one or more of the same "the whole of the main line of railroad of the said company within the State of Louisiana, commencing at Pontchatoula, in the parish of Livingston, and extending thence to the city of Baton Rouge, in the parish of East Baton Rouge, forty-four miles, more or less, thence through the parishes of East Baton Rouge and East Feliciana to the State line of the State of Mississippi, forty-five miles, more or less; also a branch railroad commencing at the said city of Baton Rouge and extending thence through the parishes of West Baton Rouge, Iberville, Point Coupee, St. Landry, Avoyelles, Rapides, by way of Alexandria, Natchitoches, and De Soto, to Shreveport or some other point on the Southern Pacific railroad, in the parish of Caddo, between Shreveport and the State line of the State of Texas, two hundred and thirty-six miles, more or less; also another branch railroad intersecting the branch railroad last described and extending thence by way of the town of Washington to Opelousas, in the parish of St. Landry, sixteen miles, more or less; also another branch railroad commencing on the main line of said first-described railroad, in the parish of East Baton Rouge, and extending through the parishes of Ascension, St. James, St. John the Baptist, St. Charles, and Jefferson to the Mississippi river at the city of New Or-
24 leans, eighty-five miles, more or less; also another branch rail-

said commencing on the said first-described main line at Pontchatoula, extending thence in a northeasterly direction through the parishes of Tangipahoa, St. Tammany, & Washington to the State line of Mississippi, to connect with the New Orleans and Meridian railroad, seventy-five miles, more or less, in all about five hundred and one miles of railroad within the said State of Louisiana, together with the right of way, road-bed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, tenders, & other rolling stock; also all real and personal estate within the State of Louisiana owned by the said company at the date of this mortgage, or which may be acquired by it thereafter, appurtenant to or necessary for the operation of said main line of said railroad or any of said branches connected with the said main line or to be connected therewith; also all other property, real and personal, of every kind and description whatsoever and wheresoever situated in the State of Louisiana which is now owned or which shall hereafter be acquired by the said company and which shall be appurtenant to or necessary or used for the operation of said main line of railroad or any of said branches; also the tenements, hereditaments, and appurtenances thereunto belonging, and all of the estate, right, title, and interest, legal and equitable, of the said company and its successors and assigns therein, together with the corporate franchises and privileges of said company at any time granted or to be granted by the State of Louisiana relative to the construction, operation, and use of said railroad within said State.

"And it is hereby understood, covenanted, and agreed
25 that should the said company at any time be in default in paying the aforesaid bonds or coupons of interest or any part or portion thereof the holder or holders of such bonds or coupons shall have the right, without further delay, to institute legal proceedings for the recovery of his or their claim and for the foreclosure of this mortgage in any court of competent jurisdiction. Moreover, it shall be lawful, upon the expiration of six months from and after the time when such default originated, for the said Union Trust Company of New York, for and in behalf and in the interest of the holder or holders of all the bonds and coupons of interest referred to in this act of mortgage, by its attorney, commissioner, or agent, to enter upon and take possession of all and singular the railroad and other property, rights, and franchises herein mortgaged and hypothecated, and to have, hold, and use the same, operating the said railroad by superintendents, managers, agents, employees, and servants, and conducting all the business thereof, making from time to time such repairs and replacements and such useful alterations, additions, or improvements thereto as may seem to said trust company judicious for the preservation of or for rendering productive the said property, and to collect and receive all tolls, freights, fares, rents, incomes, and profits thereof, and the said trust company shall have the right to collects all debts, dues, and demands due and owing to the said company at the time being uncollected, and, after deducting from the money thus received the expense of
26 operating said railroad and conducting its business, and of

all the repairs, replacements, and additions thereto, and all taxes and other charges which may then be liens on the said property superior to the rights of said trust company and of the holder or holders of the aforesaid bonds and coupon- of interest, said trust company shall apply the balance of the said money to the payment of the accrued interest on such bonds in the order in which said interest shall have become due, and if insufficient to pay the whole of such interest, then the said trust company shall pay such balance ratably, and, after the payment of the entire interest accumulating on the said bonds, any balance from time to time left in the hands of the said trust company, arising from the management or operation of the said road, shall be applied to the ratable payment, without discrimination or preference, of the principal of said bonds; provided, however, that the entry hereinabove authorized shall not be attempted until a written requisition to that effect shall have been made to the said trust company and notice thereof in writing given to the said railroad company by the holders of at least a majority of the bonds that shall have been issued, and with a further proviso that the entry aforesaid shall not have the effect of preventing the holder or holders of the said bonds or coupons or any one or more of the same from exercising the right at any time to resort to legal proceedings, as hereinbefore set forth.

By the certificate of the recorder of mortgages of the several parishes in the State of Louisiana through which the road
27 herein mortgaged runs and in which the property mortgaged and hypothecated is situated it will appear that no mortgage, hypothecation, privilege, or incumbrance of any kind rests upon the road or upon any of the property, effects, rights, grants, privileges, and franchises herein mortgaged.

In testimony whereof I have caused this act to be signed by the said Thomas C. Bates, president of the New Orleans, Baton Rouge and Vicksburg Railroad Company; by the Union Trust Company of New York, and by John Pepper and Herman Sonner, two competent and lawful witnesses, and have hereunto affixed my official signature, at the city of New Orleans, in the State of Louisiana, this first day of October, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

(Original signed) THOMAS C. BATES, *Pres't.*
FRANK N. BUTLER,
Mandatory and Agent of the Union Trust Company of New York.

JOHN PEPPER.
HERMAN SONNER.

THOMAS J. BECK, *Not. Pub.*

Five hundred dollars U. S. internal revenue stamps attached.

STATE OF LOUISIANA, }
Parish of Orleans. }

I, Michel V. Dejan, a notary public in and for the parish of Or-

leans, duly commissioned and qualified, residing in the city of New Orleans, State of Louisiana aforesaid, and representing Martin
28 Voorhies, custodian of notarial records and a notary public in and for the parish of Orleans, now on leave of absence by executive authority, do hereby certify the above and foregoing to be a true and correct copy of the original act on file and of record in the archives of the office of said custodian of notarial records.

As witness my hand and seal officially as the impress of the seal of said custodian of notarial records, at New Orleans, La., this twenty-fourth day of August, A. D. 1885. Twenty-one words interlined, four words errors, & two words enter an approved erased *approved.*

[Seal Michel V. Dejan, Notary Public, New Orleans, La.]

(Sig.) MICHEL DEJAN, *Not. Pub.*
SIRMONS.

STATE OF LOUISIANA, }
Parish of Calcasieu. }

OFFICE CLERK OF COURT, 14TH JUD'L DISTRICT.

I hereby certify that the within and foregoing copy was this day duly recorded in my office in Book "G" of Mortgages, on pages 23 to 28, inc., No. 11.

Witness my official signature and seal, at Lake Charles, this twenty-eighth day of August, A. D. 1885.

[Seal of the Clerk of the Parish of Calcasieu, La.]

(Sig.) A. M. MAYO,
D'y Clerk of said Court and ex Officio D'y Recorder.

Endorsement: N. O., B. R. & V. R. Co. *vs.* Union Trust Co.
29 Mortgage. 94. "A." Offered in evidence on behalf of complainant and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

(Here follows map marked p. 28½.)

EXHIBIT "C."

"F." (4–219.)

M. L. 40353. S. S. M. W. O. D. C. M. W. J. W. J.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *M'ch 5th*, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copies on pages 1, 2, 3, and 4 of office letters to the local officers at New Orleans and Natchitoches, La., dated November 29, 1871, and ordering withdrawals of lands for the New Orleans, Baton Rouge and Vicksburg R. R. Co., are true and literal exemplifications from the records of this office.

Seal United States General Land Office, Eagle.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Sig.) WM. A. J. SPARKS,
Commissioner of General Land Office.

J. L. M. & A. N. C.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Nov.* 29, 1871.

30 Register & receiver, New Orleans, La.

GENTLEMEN: By act 3rd March, 1871, U. S. Stat., vol. 16, page 579, sec. 22, there is granted to the New Orleans, Baton Rouge and Vicksburg railroad, to aid in its construction from New Orleans to Baton Rouge, thence by the way of Alexandria to connect with the Texas Pacific Railroad Company at its eastern terminus, every alternate section of land not mineral, designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad line, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.

In case any of said lands shall have been sold, reserved, occupied, or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternative sections and designated by odd numbers not more than ten miles beyond the limit of said alternate sections first above named.

I now enclose a diagram of that part of the road in your district, with the twenty-mile granted limit and the ten-mile indemnity limits, and you are requested to withdraw from further entry or sale all the odd-numbered sections of land falling within those limits. The even-numbered sections of land within the
31 twenty-mile limits you will hold at the double minimum of $2.50 per acre and allow homestead entries at that ratability only.

When homestead entries have been made prior to this withdrawal, the parties will hold their lands at the minimum price, but should the entries be cancelled for abandonment or other cause the lands will be, when again made subject to entry, double minimum. This order in no manner affects the even sections in the indemnity limits.

You will consider these instructions as taking effect on the day of their receipt by you, and you are requested to immediately acknowledge the date of their receipt.

Very respectfully,

(Sig.) WILLIS DRUMMOND,
Commissioner.

J. L. M. & A. N. C.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *November* 29, 1871.

Register & receiver, Natchitoches, La.

GENTLEMEN: By act 3d March, 1871, U. S. Stat., vol. 16, page 579, sec. 22, there is granted to the New Orleans, Baton Rouge and Vicksburg railroad, to aid in its construction from New Orleans to Baton Rouge, thence by the way of Alexandria to connect with the Texas Pacific Railroad Company at its eastern terminus, every
32 alternative section of land, not mineral, designated by odd numbers, to the amount of ten alternative sections per mile on each side of said railroad line, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternative sections first above named.

I now enclose you a diagram of that part of the road in your district north to Shreveport, with the 20-mile granted limits and the 10-mile indemnity limits, and you are requested to withdraw from further entry or sale all the odd-numbered sections of land falling within those limits. The even-numbered sections of land within the 20-mile limits you will hold at the double minimum of $2.50 per acre, and allow homestead entries at that ratability only. When homestead entries have been made prior to this withdrawal, the parties will hold their lands at the minimum price, but should the entries be cancelled for abandonment or other cause the lands will be, when again made subject to entry, double minimum. This order in no manner affects the even sections in the indemnity limits.

33 You will consider these instructions as taking effect on the day of their receipt by you, and you are requested to immediately acknowledge the date of their receipt.

Very respectfully,

(Sig.) WILLIS DRUMMOND,
Commissioner.

Endorsement: No. 94. Exhibit "C." Offered in evidence on behalf of complainants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "D."

Copy of bonds.

Ne varietur.

In conformity to an act of mortgage executed before — under date October 1st, A. D. 1870.

(Sig.) THOMAS J. BECK,
Notary Public.

First-Mortgage Construction Bond.

UNITED STATES OF AMERICA, *State of Louisiana.*

(Engraving.)

Principal & interest payable in gold coin, free of Government tax.

Second-mortgage bonds of $6,250,000, being guaranteed by the State of Louisiana.

1,000. No. 1488. No. 1488. £200.

The New Orleans, Baton Rouge & Vicksburg Railroad Company a corporation chartered by the State of Louisiana, December 30th 1869, for value received promises to pay to the Union Trust Company of New York, or bearer, on the first day of Oct'r A. D. 1910 one thousand dollars in United States, gold coin in the city of New York, or two hundred pounds sterling, in the city of London, England, at the option of the holder of this bond, and also to pay interest thereon in gold, in New York or London, at the option of the holder, as specified in the coupons, at the rate of eight per cent. per
34 annum, semi-annually, on the first days of April and October in each year, upon the delivery of the interest coupons and until the payment of the principal,

The whole amount of the principal and interest to be paid free of Government tax and without any deduction or imposition whatever.

This bond is one of a series of 6250 bonds of like tenor and date, numbered from 1 to 6250 inclusive, all issued by authority of the board of directors of the said company, in accordance with their charter and the laws of Louisiana. The payment at maturity, of the principal and interest of this whole series of bonds, is secured by a first mortgage on the entire main line and branches of the railroad of the said company within the State of Louisiana, including all the right of way, road-beds, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, real and personal estate, within the State of Louisiana, appurtenant to or necessary for the operation of the main line or branches of the railroad owned by said company at the date of the mortgage given to secure the payment of said whole series of bonds: or which may be acquired by it thereafter and of the corporate franchises and privileges of said company granted by the State of Louisiana or by act of Congress, relative to the construction, operation and use of said main line of railroad and its branches within the State of Louisiana, as will more fully appear from an act of mortgage executed in favor of the Union Trust Company of New York, before Thomas J. Beck notary public.
35 This bond and all the bonds of the series aforesaid, are paraphed by said notary public to identify them with the aforesaid act of mortgage.

In witness whereof, the board of directors of the New Orleans, Baton Rouge and Vicksburg Railroad Company have caused this

bond to be signed and countersigned and the corporate seal of the company to be affixed (Coat-of-arms of Louisiana.) (Pelican her offspring.) by their president by their secretary at their office in the city of New Orleans, State of Louisiana, the first day of Oct'r, A. D. 1870.

[Seal New Orleans, Baton Rouge & Vicksburg Railroad Co.]

(Sig.) THOS. C. BATES, *President.*

Countersigned:

(Sig.) PORTER FARLEY, *Secretary.*

[Written across the face in red ink:] Gold.

(Copy of coupons attached hereto) (# 1 to 80, inclusive.)

Copy of Coupons Attached to Bond (80 to Each).

$40. £8.

The New Orleans, Baton Rouge & Vicksburg Railroad Company will pay the bearer, as he may elect, in the city of New York, forty dollars United States gold coin, or in London, England, eight pounds sterling, on the first day of April, 1871, being six months' interest on bond No. 1488.

(Sig) PORTER FARLEY, *Secretary.*

[Written across the face in red ink:] Gold.

(Each coupon payable every April 1st & October 1st of each year from 1871 as above until & including October 1st, 1910.)

Endorsement: No. 1488. The New Orleans, Baton Rouge and Vicksburg Railroad Company forty-years eight per cent. first-
36 mortgage construction bond, $1,000 or £200, gold coin. Principal payable Oct'r 1st, 1910. Interest (in gold) April 1st & Oct'r, in New York or London, as holders may elect.

This bond may be registered in the owner's name on the company's books, in the city of New York, or at any other place which the company may determine, such registry being noted on the bond by the company's transfer agent; after which no transfer shall be valid, unless made on the company's book by the registered owner and similarly noted on the bond, but the same may be discharged from registry by being transferred to bearer, after which it shall be transferable by delivery, but it may be again registered as before. The registry of the bond as above shall not restrain the negotiability of the coupons by delivery.

Registered in name of —— ——, 18—.

—— ——, *Trans'r Ag't.*

(Above 2 lines 3 times repeated.)

Trustee's Certificate.

The Union Trust Company of New York hereby certifies that

this is one of a series of six thousand two hundred and fifty bonds referred to in the within-mentioned deed of trust.

UNION TRUST COMPANY OF NEW YORK,
37 By I. H. FROTHINGHAM, *Pres't, Trustee.*

Coupons each numbered on the back from —.

[Endorsed:] No. 94. U. S. circuit court, 5th circuit, western dist. La. John D. Parker *et als. vs.* N. O., B. R. & V. R. R. & Co. *et als.* Exhibit "D." Offered in evidence on behalf of complainants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "E."

Copy of bond No. 189.

Ne varietur.
In conformity to an act of mortgage executed before me under date October 1st, A. D. 1870.
(Sig.) THOMAS J. BECK,
Notary Public.

First-Mortgage Construction Bond.

UNITED STATES OF AMERICA, *State of Louisiana.*

(Engraving.)

Principal and interest payable in gold, free of Government tax.

Second-mortgage bonds of $6,250,000, being guaranteed by the State of Louisiana.

1,000. No. 189. No. 189. £200.

The New Orleans, Baton Rouge & Vicksburg Railroad Company, a corporation chartered by the State of Louisiana December 30th, 1869, for value received promises to pay to the Union Trust Company of New York or bearer on the first day of Oct'r, A. D. 1910
one thousand dollars, in United States gold coin, in the city
38 of New York, or two hundred pounds sterling, in the city of London, England, at the option of the holder of this bond, and also to pay interest thereon in gold in New York or London, at the option of the holder, as specified in the coupons, at the rate of eight per cent. per annum, semi-annually on the first days of April and October in each year, upon the delivery of the interest coupons and until the payment of the principal.

The whole amount of principal and interest to be paid free of Government tax and without any deduction or imposition whatever.

This bond is one of a series of 6250 bonds of like tenor and date, numbered from 1 to 6250 inclusive, all issued by authority of the board of directors of the said company, in accordance with their charter and the laws of Louisiana. The payment at maturity of the principal and interest of this whole series of bonds, is secured by a first mortgage on the entire main line and branches of the

railroad of said company within the State of Louisiana, including all the right of —, road-beds, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, and real and personal estate, within the State of Louisiana, appurtenant to or necessary for the operation of the main line or branches of the railroad owned by said company at the date of the mortgage, given to secure the payment of said whole series of bonds; or which may be acquired by it thereafter and of the corporate franchises and privileges of said company granted by the State of Louisiana or by act of Congress, relative to the construction, operation and use of said main line of railroad and its branches within the State of Louisiana, as will more fully appear from an act of mortgage executed in favor of the Union Trust Company of New York, (sig.) Thomas J. Beck, notary public. This bond and all of the series aforesaid, are paraphed by said notary public to identify them with the aforesaid act of mortgage.

In witness whereof, the board of directors of the New Orleans, Baton Rouge and Vicksburg Railroad Company have cau (Coat-of-arms of La.) sed this bond to be signed by their pre sident and countersigned by their secretary and the corporate seal of the company to be affixed at their office in the city of New Orleans, State of Louisiana, the first day of Oct'r, A. D. 1870.

[Seal New Orleans, Baton Rouge & Vicksburg Railroad Co.]

(Sig.) THOS. C. BATES, *President.*

Countersigned:

(Sig.) PORTER FARLEY, *Secretary.*

[Written across the face in red ink:] Gold.

(Copy of coupons attached hereto, # 1 to 80, inclusive.)

Copy of Coupons Attached to Bond (80 *to Each*).

$40. £8.

The New Orleans, Baton Rouge & Vicksburg Railroad Company will pay the bearer as he may elect, in the city of New York, forty dollars United States gold coin, or in London, England, eight pounds sterling, on the first day of April 1871, being six months' interest on bond No. 189.

(Sig.) PORTER FARLEY, *Secretary.*

[Written across the face in red ink:] Gold.

(Each coupon payable every 1st of April & October 1st of each year, from 1871 as above until & including October 1st 1910.)

Endorsement: No. 189. The New Orleans, Baton Rouge and Vicksburg Railroad Company forty-years eight per cent. first-mortgage construction bond, $1,000 or £200, gold coin. Principal payable Oct'r 1st, 1910. Interest (in gold) April 1st & Oct'r 1st, in New York or London, as holders may elect.

This bond may be registered in the owner's name on the company's books, in the city of New York, or at any other place which the company may determine, such registry being noted on the bond by the company's transfer agent, after which no transfer shall be valid unless made on the company's book by the registered owner and similarly noted on the bond, but the same may be discharged from registry by being transferred to bearer, after which it shall be transferable by delivery, but it may be again registered as before. The registry of the bond as above shall not restrain the negotiability of the coupons by delivery.

41–102 Registered in name of —— ——, 18—.

—— ——, *Trans'r Agent.*

(Above 2 lines twice repeated.)

Trustee's Certificate.

The Union Trust Company of New York hereby certifies that this is one of a series of six thousand two hundred and fifty bonds referred to in the within-mentioned deed of trust.

UNION TRUST COMPANY OF NEW YORK,

(Sig.) By I. H. FROTHINGHAM, *Pres't.*

[Endorsed:] No. 94. U. S. C. C., 5th circuit, western dist. La. J. D. Parker *et als. vs.* N. O., B. R. & V. R. R. Co. *et als.* Exhibit "E." Offered in evidence on behalf of complainants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

* * * * * * *

103 EXHIBIT "I."

THE STATE OF LOUISIANA, }
Parish of De Soto. }

I certify that a certain mortgage executed by the New Orleans, Baton Rouge & Vicksburg Railroad Company on the 1st day of October, A. D. 1870, before Thos. J. Beck, notary public in & for the parish of Orleans, given to secure payment of 6,250 first-mortgage-bonds of said company, was duly recorded in the parish of De Soto on the 8th day of October, 1870.

Given under my hand & seal of office on this the 14th day of March, A. D. 1887.

[SEAL.] (Sig.) GEO. H. SUTHERLIN,

104 *Clerk & ex Officio Recorder for De Soto Parish, Louisiana.*

Endorsement: No. 94. Exhibit "I." Offered on behalf of complainants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "J."

THE STATE OF LOUISIANA, }
Parish of Sabine. }

I certify that a certain mortgage executed by the New Orleans, Baton Rouge & Vicksburg Railroad Company on the 1st day of October, A. D. 1870, before Thos. J. Beck, notary public in & for the parish of Orleans, given to secure the payment of 6,250 first-mortgage bonds of said company, was duly recorded in the parish of Sabine on the 28th day of August, A. D. 1885.

Given under my hand & seal of office this M'ch 23rd, A. D. 1887.

[SEAL.] (Sig.) W. W. McNEELY,
Cl'k Dist. Court & ex Officio Recorder.

Endorsement: No. 94. Exhibit "J." Offered in evidence
105 on behalf *on behalf* of complainants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT " K."

OFFICE OF M. C. MOSELLEY,
ALEXANDRIA, LA., *May 21st*, 1886.

Messrs. Kinnard, Howe & Prentiss.

GENTLEMEN: Have just returned from Opelousas, where I went to attend to the Carmouche case, which, however, was not reached on the docket & cannot now be tried before Sept.

In compliance with your letter of the 17th, I have made a diligent seach of the record & have been able to find only two recordations in favor of the Union Trust Co. of N. Y. against the N. O., B. R. & V. R'y Co. The dates are as follows:

Oct. 6th, 1870, mortgage to secure 6,250 bonds, $1,000 each, 6,250,000; Sept. 17th, 1872, mortgage to secure 12,000 bonds of $1,000, 12,000,000.

The former bearing 8% interest & the latter 7%.

The only others registered are the following, with which you are doubtless familiar:

Oct. 1st, 1880, N. O. P. R'y to the Fidelity Insurance, Trust & Safe Deposit Co. of Philadelphia, trustee; April 25th, 1883, N. O. P. R'y Co. to John F. Dillon & H. M. Alexander; Feb. 11th, 1884, N. O. P. R'y Co. to John F. Dillon & H. M. Alexander, supplemental land-grant & sinking-fund mortgage; Nov. 21st, 1884, N. O. P. R'y
Co. to the Fidelity Insurance & Safe Deposit Co. of Philadel-
106 phia, supplemental mortgage; Jan. 29th, 1885, T. & P. R'y Co., general mortgage & terminal bonds of Aug. 1st, '84, to F. I., T. & S. D. Co.

The mortgage in favor of the Union Trust Co. of N. Y. have not been reinscribed in this parish within the last ten years.

Hoping this will reach you in due time, I remain,

Yours truly,

(Sig.) M. C. MOSELEY.

Endorsement: No. 94. Exhibit "K." Offered in evidence on behalf of complainants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "L."

New Orleans Pacific Railway Co., land department.

Over 500,000 acres of agricultural land for sale. (Sig.) A. E. Lemee, agent.

NATCHITOCHES, LA., *May* 20, 1886.

Messrs Kennard, Howe & Prentiss, New Orleans.

GENTLEMEN: Replying to your favor of the 17th inst., I have to state that the mortgage dated Oct. 1st, 1870, of the N. O., B. R. & V. R. R. Co., in favor of the Union Trust Co. of N. Y., was recorded in the recorder's office of this parish Oct. 12, 1870; another mortgage of same, in favor of same, recorded Sept. 21, 1872. There
107 is also another mortgage of the N. O., B. R. & V. R. R. Co., "in favor of certain holders of bonds," which was recorded January 25, 1871.

None of these mortgages have been reinscribed.

These are the only mortgages I can find of record given by the "Backbone" R. R. Co.

Yours truly,

(Sig.) A. E. LEMEE.

Endorsement: "L." No. 94. Exhibit "L." Offered in evidence on behalf of complainants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "M."

Albert H. Leonard. Morris Marks. Bernard Bruenn.

LAW OFFICES OF LEONARD, MARKS & BRUENN,
No. 30 CARONDELET STREET, NEW ORLEANS, —— —, 188–.

THE STATE OF LOUISIANA, }
Parish of Grant. }

I certify that a certain mortgage executed by the New Orleans, Baton Rouge & Vicksburg Railroad Company on the 1st day of October, A. D. 1870, before Thos. J. Beck, notary public in & for the parish of Orleans, to secure payment of 6,250 first-mortgage bonds of said company, was duly recorded in the parish of Grant on the 5th day of September, A. D. 1885, in Book E of Mortgages, folio- 188 to 194.

Given under my hand & seal of office this March 14th, A. D. 1887.

[SEAL.] (Sig.) S. B. SHOCKELFORD,
108 *Cl'k Dist. Court & ex Officio Recorder, P'sh Grant, La.*

Recorder's fee, $1.00, paid.

S. B. SHOCKELFORD, *Cl'k.*

Endorsement: No. 94. Exhibit "M." Offered in evidence on behalf of complainants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

109 EXHIBIT "9 M," COMPLAINANTS'.

U. S. Circuit Court, 5th Circuit, Western District Louisiana. In Equity.

JOHN D. PARKER
vs.
N. O., B. R. & V. R. R. Co. } No. 94.

Statement of Evidence Adduced in said Cause.

Complainant offers—

1. Act of the legislature of La. incorporating the New Orleans, Baton Rouge & Vicksburg Railroad Company, act No. —, session of 1869.

2nd. Authentic copy of act of mortgage from N. O., B. R. & V. R. R. Co. to Union Trust Company & others, executed before T. J. Beck, notary public, on Oct'r 1st, 1870.

3. Act of legislature of Louisiana, No. 100, session 1872.

4. Map designating route of N. O., B. R. & V. R. R. Co. from Baton — to Shreveport, with certificate from General Land Office.

5. Copies from Department of the Interior, General Land Office, showing withdrawals of lands, with certificate.

6. Bonds Nos. 1488 & 189, with coupons attached.

7. Patents issued to New Orleans & Pacific R. R. Co. as assignee of the N. O., B. R. & V. R. R. Co.

8. Certificates showing registry of act of mortgage from N. O., B. R. & V. R. R. Co. to Union Trust Co. & others in parishes
110 Calcasieu, St. Landry, Natchitoches, De Soto, Rapides, Grant, Sabine.

U. S. Circuit Court, Western Dist. of La. In Equity.

JOHN D. PARKER *et als.*
vs.
N. O., B. R. & V. R. R. Co. *et als.* } No. 94.

Coplaintiff W. A. Hamlin joins with the complainant Parker in his offer of evidence, and in addition thereto offers 5 bonds, numbers one to five, inclusive, with coupons thereto attached, commencing from April 1, 1872, said bonds being for $1,000 or £200 gold coin each and said coupons being for $40 or £8 gold coin each.

U. S. Circuit Court, E. D. of Louisiana.

JOHN D. PARKER
THE N. O., B. R. & V. R. R. Co. *et als.* } No. 94.
vs.

Note of Evidence of Respondents.

Respondents offer and introduce testimony of E. B. Wheelock, taken by consent before Michel, N. P., and the documents therein mentioned. Testimony marked "E. B. W."

111 Also original and supplemental land-grant mortgages made by New Orleans Pacific Railway Company and referred to in bill and answer, marked "R 9 and R 10."

Also certificates of recordation of same in the mortgage books of the several parishes in which the lands in question are situate, and of which a list is hereinafter set forth. It is agreed that these certificates need not be copied in any transcript of appeal, and by consent respondents put in the following list, showing dates of recordation of said N. O. P. land-grant mortgages in the various parishes—list to have same effect as certificates:

List.

Certificates of recordation of N. O. P. land-grant mortgage in following parishes in Louisiana:

Parish.	Date of record.
Winn	April 27, 1883
Grant	" 25, 1883
Bienville	May 12, 1883
Bossier	" 2, 1883
Webster	" 8, 1883
Catahoula	" 2, 1883
Caddo	April 27, 1883
Avoyelles	" 30, 1883
Red River	" 23, 1883
Natchitoches	" 21, 1883
Rapides	" 20, 1883
Sabine	" 2, 1883
Vernon	May 3d, 1883
St. Landry	April 28, 1883
Calcasieu	May 17, 1883
De Soto	" —, 1883
St. Mary	April 28, 1883

112 Supplemental mortgage recorded in February, 1884, in same parishes.

Endorsement: No. 94. John D. Parker *vs.* N. O., B. R. & V. R. R. Co. (Note I. Evidence.) 9 M. Exhibit "9 M." Offered in evidence on behalf of complainants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k. Filed Aug. 6th, '87. E. J. Nolan, d'y cl'k.

113 *Motion & Order.*

Circuit Court of the United States, 5th Circuit, Western District of Louisiana. In Equity.

JOHN D. PARKER
vs.
THE N. O., B. R. & V. R. R. Co. *et al.* } No. —. In Circuit Court.

To the hon. the judges of said circuit court:

John D. Parker, complainant, represents to the court that subpœnas in chancery have been issued in said cause, directed to each & every defendant therein and placed in the hands of the marshal of said district for service; that after diligent search said marshal was unable to find any one of said defendants, & has returned said subpœnas unserved; that the defendants in said cause each and all reside & have their domicil out of said district, and that no one of them is an inhabitant of said district.

The premises considered, he prays that your honors grant such order herein as will compel said defendants and each of them to appear and answer his said bill of complaint in said cause filed; and petitioner will ever pray, &c.

(Sig.) JOHN D. PARKER,
(Sig.) By A. H. LEONARD, *Solicitor.*

Personally appeared before me, the undersigned authority, A. H. Leonard, who, being duly sworn, deposes & says that he is one of the solicitors of the complainant, John D. Parker, who is
114 absent from the said district, and the statements made in and allegations of the within petition are true to the best of his knowledge and belief.

(Sig.) A. H. LEONARD.

Sworn to & subscribed before me this the 12th day of April, A. D. 1886.

(Sig.) J. W. WHEATON, *Cl'k.*

U. S. Circuit Court, 5th Circuit, Western District of Louisiana. In Equity.

JOHN D. PARKER
vs.
THE N. O., B. R. & V. R. R. Co. *et al.* } No. 94.

The above and foregoing affidavit and petition considered, and by reason of the law, it is ordered that the defendants named in bill of complaint filed by John D. Parker against the New Orleans, Baton Rouge & Vicksburg Railroad Company *et als.*, viz., the New Orleans, Baton Rouge & Vicksburg Railroad Company, the New Orleans Pacific Railroad Company, the Union Trust Company of New York, S. D. McEnery, John F. Dillon, & Henry M. Alexander,

be, and they are hereby, directed to appear, plead, answer, or demur on or before the third (3rd) Monday in June next, A. D. 1886.

It is further ordered that this order be published in some public newspaper published in the city of Shreveport, Louisiana, once a week for six consecutive weeks prior to said third Monday in June, 1886.

Defendants' counsel present takes notice of this order.

(Sig.) ALECK BOARMAN, *Judge.*

115 Endorsement: No. 94. John D. Parker *vs.* N. O., B. R. & V. R. R. Co. Motion & order. Filed April 16th, '86. (Sig.) J. W. Wheaton, cl'k.

Appearances.

THURSDAY, *Oct.* 28, 1886.

J. D. PARKER
vs.
THE N. O., B. R. & V. R. R. Co. } No. 94.

Order to plead to be published for 6 weeks in Shreveport Journal filed & order published.

TUESDAY, *Dec'r 7th,* 1886.

J. D. PARKER
vs.
THE N. O., B. R. & V. R. R. Co. } No. 94.

And now come the *the* complainant in this cause and set down for argument the demurrer to their cross-bill filed herein by John D. Parker, the original complainant in this cause, and asks that the same be fixed for a day, according to the rules.

(Sig.) KENNARD, HOWE & PRENTISS,
" DILLON & SWAYNE,
Sol. for Complain'ts.

116 *Demurrer of New Orleans P. R'y Co. & John F. Dillon & H. M. Alexander.*

U. S. Circuit Court, Western District of Louisiana.

JOHN D. PARKER
vs.
THE NEW ORLEANS & BATON ROUGE AND VICKSBURG RAILROAD COMPANY *et als.*

The joint and several demurrer of the New Orleans Pacific Railway Company and of John F. Dillon and Henry M. Alexander, made defendants herein, to the bill of complaint of John D. Parker, the above-named complainant.

These defendants, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained

to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show and each of them shows—

That the complainant has not in and by his said bill made or stated such a case as entitles him in a court of equity to any discovery from these defendants or any of them — to any relief against them or any of them as to the matters contained in the said bill or any of such matters.

Wherefore, and for other good causes of demurrer appear-
117 ing in the said bill, these defendants and each of them do demur thereto and humbly demand the judgment of this court whether they or any of them shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

(Sig.) KENNARD, HOWE & PRENTISS,
Solicitors for said Defendants.

(Sig.) W. W. HOWE, *Of Counsel.*

I certify that in my opinion the above demurrer is well founded in point of law.

(Sig.) W. W. HOWE.

U. S. OF AMERICA,
Parish of Orleans, } *ss:*

Edward B. Wheelock, being duly sworn, says that he is president of the New Orleans Pacific Railway Company, and that the foregoing demurrer is not interposed for delay.

(Sig.) E. B. WHEELOCK.

Sworn to and subscribed before me, in my office, No. 162 Common street, New Orleans, Louisiana, this 19th day of June, 1886.

[Seal Michel V. Dejan, Notary Public, New Orleans, La.]

(Sig.) A. MICHEL DEJAN, *Not. Pub.*

U. S. OF AMERICA,
Parish of Orleans, } *ss:*

William W. Howe, being duly sworn, says that he is one
118 of the solicitors of John F. Dillon and Henry M. Alexander, and has been instructed by them to file the above demurrer on their behalf; that they are absent from this circuit, and that the said demurrer is not interposed for delay.

(Sig.) W. W. HOWE.

Sworn to and subscribed before me this 6 July, 1886.

[Seal Octave Morel, Notary Public, New Orleans, La.]

(Sig.) OCTAVE MOREL, *Not. Pub.*

Endorsement: U. S. circuit court, W. D. of La. John D. Parker *vs.* The N. O., B. R. & V. R. R. Co. Demurrer of New Orleans P.

R'y Co. and John F. Dillon & H. M. Alexander. Filed June 30th, 1886. (Sig.) Aleck Boarman, judge.

Judgment Pro Confesso.

U. S. Circuit Court, 5th Circuit, Western Dist. La. In Equity.

JNO. D. PARKER
vs.
THE N. O., B. R. & V. R. R. Co. *et al.* } No. 94.

On motion of A. H. Leonard, solicitor for plaintiffs, and on suggestion to the court & due proof thereof that notice has been
119 given all defendants by publication in accordance with previous order of this court, and on further suggestion that several defendants, viz., the New Orleans, Baton Rouge & Vicksburg Railroad Company, the Union Trust Company of New York, and S. D. McEnery, governor of Louisiana, have made no appearance, it is ordered that as against said defendants there be judgment *pro confesso*.

August 4th, 1886.

(Sig.) ALECK BOARMAN, *Judge.*

Endorsement: 94. John D. Parker *vs.* N. O., B. R. & V. R. R. Co. Judgm't *pro confesso*. Ent'r'd & filed Aug. 4, '86. E. J. Nolan, d'y cl'k.

Decree Overruling Demurrer.

Circuit Court, 5th Circuit, Western Dist La. In Equity.

JNO. D. PARKER
vs.
THE N. O., B. R. & V. R. R. Co. *et al.* } No. 94.

This cause came on to be heard on demurrer filed on behalf of The New Orleans Pacific Railway Co., John F. Dillon, & Henry M. Alexander, defendants, and on argument by solicitors for both plaintiff & defendants, and thereupon it is ordered and decreed that said demurrer be, and the same is, overruled.

120 It is further ordered that said defendants have until the first rule day in October next to file answer.

Sept. 28th, 1886.

(Sig.) ALECK BOARMAN, *Judge.*

Endorsement: No. 94. Jno. D. Parker *vs.* N. O., B. R. & V. R. R. Co. Decree overruling demurrer. Filed Sept. 28, 1886. E. J. Nolan, d'y cl'k.

Answer of New Orleans Pacific R'y Co. & of Jno. F. Dillon & Alexander, Trustees.

Circuit Court of the United States, Western District of Louisiana.

JOHN D. PARKER
v.
NEW ORLEANS, BATON ROUGE AND VICKSBURG RAILROAD COMPANY, The New Orleans Pacific Railway Company, The Union Trust Company of New York, John F. Dillon, Henry M. Alexander, and Samuel D. McEnery.

The joint and several answer of the New Orleans Pacific Railway Company and of John F. Dillon and Henry M. Alexander to the bill of complaint of John D. Parker.

The said defendants, severally reserving the right of exception to the said bill of complaint, now come and answer the same as fully and completely as they are advised that it is material to do so.

121

They admit, on information and belief, that the legislature of Louisiana, by an act approved December 30th, 1869, incorporated the New Orleans, Baton Rouge and Vicksburg Railroad Company, and they refer to said act for an enumeration of the powers of the said corporation, and do not admit the averments in the bill of complaint in that behalf, except so far as said averments truly state the powers conferred by said act of corporation.

These defendants aver that by the said act of incorporation it is provided that the said first-mortgage bonds and the mortgage securing the same contemplated by said act should be a lien only to the extent of $12,500 per mile upon each and every mile of the aforesaid main line and branches of said railroad within the State of Louisiana, including the right of way, road-bed, rails, depots, stations, shops, machinery, tools, engines, cars, and all real and personal estate within the State of Louisiana appurtenant to or necessary for the operation of the said main line and branches of railroad owned by the company at the date of the said mortgage or which may be acquired by it thereafter, and all the corporate franchises and privileges of the said company granted by the State of Louisiana relative to the construction, operation, and use of said railroad within the State of Louisiana; and these defendants aver that the power thus given and limited to make and execute the said first mortgage did not authorize the execution of any mortgage which should cover or embrace any lands which might thereafter be acquired by said company by virtue of any grant of Congress to that effect, except so far, if at all, as said lands should be actually used and occupied by the said railroad for its road-bed & track and for the actual operation of trains, and for stations and depot grounds. Defendants deny that the said instrument of mortgage set out in the bill of complaint or therein referred to, dated the first day of October, 1870, either did or legally could embrace the 679,287.64 acres of land or

122

any part thereof which were, on or about the 3rd day of March, 1885, patented by the United States to the New Orleans Pacific Railway Company, or the lands, or any part thereof, which by the 22nd section of said act of Congress of March 3, 1871, were granted, as in said act provided, to the New Orleans, Baton Rouge and Vicksburg Railroad Company.

These defendants have no knowledge or information sufficient to form a belief, and therefore deny, that on the 1st day of October, 1870, or at any other time, the New Orleans, Baton Rouge and Vicksburg Railroad Company authorized by due corporate resolution or otherwise the execution of the bonds mentioned in
123 the bill of complaint, to wit, bonds for one thousand dollars, each bearing date in 1870, and payable on the 1st day of October, 1910, with coupons thereto attached, and with recitals specified and contained in the said bill of complaint, or in like manner, or in any manner, authorized the execution of the said alleged mortgage of October 1st, 1870, to the Union Trust Company of New York to secure the said bonds and coupons, and defendants require strict proof of said allegations and each of them contained in said bill of complaint.

They specially deny that said corporation ever authorized the mortgaging of any land grant or the land thereof by the act or instrument of October 1st, 1870, set up in the bill.

These defendants have no knowledge or information to form a belief whether said mortgage was executed in the State of Louisiana and under the laws thereof, as alleged in the bill of complaint, and require strict proof thereof. They have no knowledge as to whether said mortgage was accepted by the Union Trust Company for the benefit of all future holders of said bonds and coupons, and require strict proof thereof. They have no knowledge as to whether it was duly executed and signed before a notary public, in the city of New Orleans, duly commissioned and qualified, in the presence of two competent witnesses, and was and is under the laws of said State an authentic act, and require strict proof thereof.

124 Defendants have no knowledge or information sufficient to form belief as to whether said alleged mortgage was duly recorded, as required by the laws of the State of Louisiana, in the several parishes specified in this behalf in the bill of complaint, and require strict proof of the same; and they further aver that even if the said mortgage was duly recorded in any of said parishes, it has not been reinscribed, as required by the laws of Louisiana, within ten years next succeeding its original registry, in any of said parishes, nor until after said mortgage mentioned in the bill of complaint executed by the New Orleans Pacific Railway Company to Dillon and Alexander, trustees, had been duly executed and recorded according to the requirements of the laws of the State of Louisiana in that behalf.

These defendants deny that said company by said act of mortgage of October 1st, 1870, mortgaged and hypothecated, or could lawfully do so, to any future holder or holders of the said bonds or coupons or any part of the same all the property and rights of any

kind owned by said company at the date of said mortgage or which it might thereafter acquire.

They deny that if said mortgage was executed, as alleged, or recorded, as alleged, that said company could not sell, transfer, assign, or encumber said property so mortgaged or any part thereof,
125 and especially deny that it — sell, transfer, or assign any rights which it acquired under and by virtue of the 22nd section of said act of Congress of March 3, 1871, except subject to said mortgage, as alleged in the bill of complaint in that behalf.

These defendants have no knowledge or information sufficient to form a belief as to whether said bonds and coupons were engraved, executed, and signed, as alleged in the said bill of complaint, and require proof thereof, or whether said mortgage was made and executed to secure the payment of the same, as alleged in the complaint, and require proof thereof; nor have these defendants any knowledge or information sufficient to form a belief as to whether any resolutions such as are alleged in the bill of complaint were adopted by said board or said company or whether said company placed said bonds in the market and offered the same for sale and disposed of the same or any part thereof for a valuable consideration, and, if material in this case, require proof thereof.

These defendants admit that in the year 1872 an act of the legislature of Louisiana of December 11th, 1872, was adopted, being number 100 of the session of the legislature of 1872, and for greater certainty they refer to said act for a fuller statement of its provisions, and they show that said act referred to the land grant made by the 22nd section of the act of Congress of March 3, 1871, and provided for the giving up of the scheme of second-mortgage
126 bonds to be guaranteed by the State as contemplated in the act of 1869 incorporating the New Orleans, Baton Rouge and Vicksburg railroad, and authorized first-mortgage bonds to be issued by said company at the rate of thirty thousand dollars per mile, to be — first lien on the real and personal property and all lands acquired by the act of Congress or otherwise; and they aver that said act exhibits the understanding alike of the New Orleans, Baton Rouge and Vicksburg railroad and the legislature of Louisiana that no mortgage on said granted lands was ever contemplated or authorized by said act of 1869 incorporating said company or was ever established by said alleged act of mortgage of October 1st, 1870.

Defendants admit the passage of the act of Congress of May 2nd, 1872, but refer to the said act for greater certainty as to its provisions and effect.

These defendants deny that the grant made by the act of Congress of March 3, 1871, and particularly by the 22nd section thereof, was a present grant in such sense as to vest in the New Orleans, Baton Rouge and Vicksburg Railroad Company title to the lands granted without further acts to be done by the grantee or its assigns, as hereinafter set forth, and deny that said lands became and were immed-ately subject to the said alleged mortgage of October, 1870. These defendants have been informed that on or about November

11th, 1871, the New Orleans, Baton Rouge and Vicksburg
127 Railroad Company filed some map of the general route of its road in the General Land Office, at Washington, but of the time when and the particulars of which they are not advised, and require proof thereof; but they aver that said railroad company never filed in the Department of the Interior at any time any map of definite location of the line of their said railroad or any part thereof or any map of definite location whatever; and they aver that said company never made any definite location of its line of railroad or any part thereof or ever built or constructed any part of its authorized line of railroad.

These defendants have no knowledge or information sufficient to form a belief, and therefore deny, that on the faith of said acts of Louisiana and of the said acts of Congress and of the action taken thereon in respect of said bonds and mortgage plaintiff has in good faith and for a valuable consideration acquired and now holds two of said bonds with coupons thereon attached, as alleged in the bill of complaint.

Defendants admit that on or about the 5th day of January, 1881, and not the 5th day of January, 1880, as alleged in the bill of complaint, said New Orleans, Baton Rouge and Vicksburg Railroad Company executed to the defendant, The New Orleans Pacific Railway Company, in due form a deed of conveyance, granting and conveying to the said last-mentioned railway company all right, title, and interest of the said New Orleans, Baton Rouge and
128 Vicksburg Railroad Company, its successors and assigns, in and to a certain grant of public lands granted to the said company by the act of Congress of the United States approved March 3, 1871, which said conveyance was duly executed by said grantor company and received and accepted by the grantee company, and was subsequently duly ratified by the stockholders of the said grantor company.

These defendants deny that said sale and transfer to the New Orleans Pacific Railway Company was made subject to the said alleged mortgage of October 1st, 1870, and that said lands sold and transferred were acquired by said New Orleans Pacific Railway Company subject to the said mortgage.

Further answering, these defendants aver that on the 19th day of February, 1876, the legislature of the State of Louisiana passed an act entitled An act to confirm the notarial charter of the New Orleans Pacific Railway Company, with amendments thereto; to extend the term of existence of said company, and to confer thereon certain powers and franchises, as by said act, which is hereby referred to and made part hereof, more fully appears.

That by said act and its charter the said New Orleans Pacific Railway Company was authorized to construct a railroad from the city of New Orleans through the State of Louisiana to a con-
129 nection with the Texas and Pacific railroad at Shreveport; that prior to 1880 the New Orleans Pacific Railway Company had built and graded but a small part of its road, and the said New Orleans, Baton Rouge and Vicksburg Railroad Company

had never graded or built any portion of its road and was unable to do so; that in 1880 the New Orleans Pacific Railway Company found it would be enabled to raise means to construct its road provided it should be able to acquire any existing right which the New Orleans, Baton Rouge and Vicksburg Company might have under the 22nd section of the act of Congress of March 3, 1871; that the said deed of January 5, 1881, was executed in pursuance of contracts previously made therefor, and the Department of the Interior was notified of said transfer to the New Orleans Pacific Railway Company; that on the 21st of February, 1881, the Commissioner of the General Land Office recognized the transfer to the New Orleans Pacific Railway Company to be complete; on the faith of which the said New Orleans Pacific Railway Company proceeded with the construction of the said road as required by the act of Congress of the United States, and on the 27th of October, 1881, duly filed in the Department of the Interior a map of the definite location of a part of its road, and on the 17th of November, 1882, likewise duly filed with the Department of the Interior a map of definite location of the rest of its road between New Orleans and
130 Shreveport in all respects as required by acts of Congress.

That commissioners were appointed by the Secretary of the Interior to examine the road so constructed by the New Orleans Pacific Railway Company, who reported that the same had been constructed in full compliance with the acts of Congress in that behalf, which reports were laid before the Secretary of the Interior, and on March 13, 1883, that officer found and decided that the New Orleans Pacific Railway Company had the right to receive the lands under the 22nd section of said act, and that patents for such lands as may have been earned by the said company should be issued to it, which finding and decision was laid before the President of the United —, who, on the 16th day of March, 1883, as authorized by and conformably to *to* the said act of Congress of March 3, 1871, endorsed the same: "The within recommendation approved—Chester A. Arthur."

These defendants admit that by reason of the said construction of the said road by the said New Orleans Pacific Railway Company whereby it earned said lands, on or about the 3rd of March, 1885, patents of the United States for about 679,287.64 acres of lands were, under the Secretary of the Interior and of the President of the United States, issued to the said New Orleans Pacific Railway Company.

Defendants aver that said New Orleans, Baton Rouge and
131 Vicksburg Company never at any time filed any map of definite location of the line of its road or any part thereof; that the maps filed as aforesaid by the New Orleans Pacific Railway Company on the 27th of October, 1881, and the 17th of November, 1882, were the first and only maps of definite location of the said road ever filed with the Department of the Interior; that, as they are advised, the legal title to all of said lands in place granted by the 22nd section of the act of March 3, 1871, remained in the United States at least until the said maps of definite location were filed, if

not until the said patents were issued therefor, on the 3rd day of March, 1885, and as to the indemnity lands the title remained in the United States until they were actually selected, which selections were made by the New Orleans Pacific Railway Company in pursuance of its definite location and the construction of its road; and so these defendants say and aver that the title to no part of the lands so patented ever vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company, as alleged in said bill of complaint or otherwise, or was any title to it ever recorded in Louisiana, nor did said last-named company ever acquire any equity, by reason of the construction of said road or otherwise, to call on the United States to convey to it the title to said lands or any part thereof; and these defendants further show that the title to said lands so patented
132 and to all of them proceeded from the United States directly to the New Orleans Pacific Railway Company, and was held by — in its own right absolutely and not as trustee for the New Orleans, Baton *Baton* Rouge and Vicksburg Railroad Company, or its mortgage bondholders, or the complainant in this suit. These defendants aver that said lands upon which the bill seeks to establish a lien were used by said New Orleans Pacific Railway Company to enable it to construct its said road, and were used and appropriated in part payment of the cost of constructing the same.

The defendants aver that after the construction of said road and in order to obtain said patents the New Orleans Pacific Company was obliged to pay and did pay large expenses for the surveying, selecting, and conveying the said lands, amounting to many thousands of dollars.

Defendants say that they have no knowledge or information as to whether, on the 28th day of December, 1870, said New Orleans, Baton Rouge and Vicksburg Railroad Company made and executed a mortgage in favor of the governor of Louisiana, as trustee, to secure the payment of 6,250 second-mortgage bonds, as alleged in the bill of complaint, and leave complainant to make such proof as he shall be advised.

These defendants believe that it is true that on 4th of September, 1872, said New Orleans, Baton Rouge and Vicksburg Railroad
133 Company executed a certain mortgage in favor of the Union Trust Company of New York, but deny that it was on the same property embraced in the mortgage of October 1st, 1870, which said mortgage of 1872 was styled, as alleged in the complaint, a mortgage to secure seven per cent. land-grant and sinking-fund gold bonds; and these defendants, while not admitting the validity of the said mortgage and not being advised how many of said bonds are outstanding thereunder, insist that said mortgage shows on its face and by its terms that the said railroad company understood that it had not therefore made a mortgage on the said land grant by the act of mortgage of October 1st, 1870, or otherwise, and that said alleged mortgage of 1872 was the first mortgage which said company had undertaken to make pledging or hypothecating said land grant claimed under the said act of Congress of March 3, 1871.

Defendants admit that by the acts of mortgage dated April 18th,

1883, and January 5th, 1884, the New Orleans Pacific Railway Company made and executed in favor of the defendants, John F. Dillon and Henry M. Alexander, of the city of New York, as trustees, a land-grant and sinking-fund mortgage of all the lands acquired by the New Orleans Pacific Railway Company from the United States by virtue of its construction of the said railroad to secure the payment of its land-grant and sinking-fund bonds, limited to
134 an issue of $2.50 per acre, as will more fully appear by reference thereto. These defendants deny that the said mortgage in favor of the said Dillon and Alexander is subsequent and subordinate to the alleged mortgage so as aforesaid made and executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company of October 1st, 1870.

The said Dillon and Alexander, further answering, say that said bonds issued in pursuance of the said acts of mortgage of April 18th, 1883, and January 5, 1884, are outstanding in the hands of bondholders for value, except so far as the same have been actually exchanged pursuant to the provisions of said acts of mortgage for the lands so patented by the United States March 3, 1885, to the New Orleans Pacific Railway Company.

Defendants further say that if it be true that complainant holds the bonds he avers to be in his possession, and that they have attached to them coupons as by him averred, all of the said coupons maturing up to 1880, and including April 1, 1881, have been extinguished by limitation of five years from the maturity thereof, and said complainant can maintain no action by reason of prescription, and these defendants claim the benefit of this prescription and limitation as if the same had been set up by special plea.

These defendants show that the legal title to the said lands so patented as aforesaid passed from the United States to the
135 New Orleans Pacific Railway Company in the manner hereinbefore shown, and by said acts said lands were mortgaged to the said trustees, Dillon and Alexander, for the benefit of the said trust created in favor of the holders of said bonds executed by the New Orleans Pacific Railway Company, and that by reason of the actual construction of the said road by the New Orleans Pacific Railway Company, whereby these lands were earned by it, and by its means, its rights and equities and those of Dillon and Alexander, trustees, are superior to any right or equity of the said complainant, who, if the facts alleged in the said complaint are true, which these defendants deny, has for fifteen years slept upon his rights, and during the period when said railroad was being constructed by said New Orleans Pacific Railway Company never set up any claim under said mortgage nor notified said company or said trustees of any claim thereunder, and by his laches has disentitled himself to any relief as against said New Orleans Pacific Railway Company or against said Dillon and Alexander.

And these defendants severally deny each allegation of the complaint not herein specifically answered, denied, or admitted; deny all unlawful combination, conspiracy, and acts wherewith by the bill they are charged; without this, that there is any other matter, cause

or thing in the said bill of complaint contained material or necessary for these defendants or either of them to make answer
136 unto and not herein sufficiently answered, confessed, or denied is true; all of which these defendants are ready and willing to aver and prove, and they pray to be hence dismissed with their reasonable costs. This answer is filed by the said New Orleans Pacific Railway Company on its own behalf, under its corporate seal, thereto lawfully affixed.

THE NEW ORLEANS PACIFIC R'Y CO.,
By (Sig.) E. B. WHEELOCK, *President.*

[Seal New Orleans Pacific Railway Company.]

(Sig.) JOHN F. DILLON,
(") HENRY M. ALEXANDER, *Trustees,*
By (Sig.) KENNARD, HOWE & PRENTISS.
(") DILLON & SWAYNE, *Solicitors.*

Attest:
(Sig.) ROB'T STRONG, *Sec'y.*
(Sig.) KENNARD, HOWE & PRENTISS,
Sol's for said Railway Company.

Endorsement: U. S. circuit court, W. D. of La. No. 94. John D. Parker *vs.* The N. O., B. R. & V. R. R. Co. *et al.* Answe- of New Orleans Pacific R'y Co. and of Dillon & Alexander, trustees. Filed Oct. 2, '86. E. J. Nolan, d'y cl'k.

137 EXHIBIT "E. B. W."

United States Circuit Court, Western District of La.

JOHN D. PARKER
vs.
NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD COMPANY *et als.* } No. 94.

Testimony of E. B. Wheelock, Esq., on Behalf of the Defendants.

138 United States Circuit Court, Western District of La.

JOHN D. PARKER
vs.
NEW ORLEANS, VICKSBURG & BATON ROUGE RAILROAD CO. *et als.* } No. 94.

Testimony taken by consent, at the office of Messrs. Kennard, Howe & Prentiss, No. 3½ Carondelet street, New Orleans, La., on behalf of the defendants, The New Orleans Pacific Railway Company, John F. Dillon, and Henry M. Alexander, trustees, and who are also cross-complainants in the case.

NEW ORLEANS, *March 17th*, 1887.

Appearances: Messrs. Leonard, Marks & Bruenn, for plaintiffs;

Mr. Alfred Goldthwaite, for intervenors; Messrs. Kennard, Howe & Prentiss, for defendants.

Testimony of Mr. E. B. Wheelock, p. 2.

Reported by John T. Michel, stenographer.

Mr. E. B. WHEELOCK, being duly sworn, says:

By Judge HOWE:

It is agreed that if the cross-bill be not dismissed, the testimony of this witness is to be used with respect to the cross-bill as well as the answer.

By Judge HOWE:

Respondent offers in evidence the act No. 14 of the acts of 1876 of the General Assembly of Louisiana, being the charter of the New Orleans Pacific Railway Company, which it is agreed may
139 not be copied in the record, and in case of appeal either party may refer to it in the printed statutes.

Q. Mr. Wheelock, you are the president of the New Orleans Pacific Railway Company?

A. Yes, sir; I am.

Q. You have been so since its first organization?

A. Since its formation.

Q. Will you state by what company the New Orleans Pacific railway was finally constructed?

A. By the American R'y Improvement Company. That was the name of the construction company.

Q. Please state, in 1880, what necessity you found to exist in order to construct the New Orleans Pacific Railway Company, and what plan you finally adopted with reference to the land grant which is in question in this case.

A. I found it necessary, to secure the construction of the road and to secure its equipment, in addition to the bonds and stocks and after the payment of all the liabilities in full of the New Orleans Pacific, to also pledge the proceeds or the assignment of whatever might be acquired from this land grant which had been previously made to the New Orleans, Baton Rouge & Vicksburg Railroad Company.

Q. Well, state whether it was then in contemplation to acquire if possible by assignment the rights of the New Orleans, Baton Rouge & Vicksburg Railroad Company to the land grant under the act of 1871.

A. For nearly five years or for four consecutive years I was in Washington attempting to secure that land grant for the
140 New Orleans Pacific Railway Company.

Q. Well, now, please state why it was necessary in 1880—(I fix that date because it was first prior to your agreement for the construction of the road)—why it was necessary to obtain this land grant if possible and to consecrate the proceeds to the construction of the New Orleans Pacific Railway Company. What were the financial reasons for it?

A. To enable me to get the railroad built.

Q. State whether or not the railroad could have been constructed with capital obtained here in New Orleans or in Louisiana.

A. No, sir; it was impossible to do it. We had exhausted every means and made every effort, without avail.

Q. Well, as a matter of fact, then, I understand that when you came to agree with the American Railway Improvement Company for the construction of this railway from New Orleans to the town of Shreveport it became necessary that they should have as a part of their compensation the proceeds in some form of this land grant?

A. Yes, sir.

Q. Well, how was that matter afterwards arranged with the American Railway Improvement Company—that is to say, in what form did they receive the proceeds of this land grant?

A. They rec'd it by the issuance of bonds under a mortgage.

Q. Well, then, these bonds, as I understand it, are the bonds
141 secured by the land-grant mortgages of the New Orleans Pacific Railway Company which are mentioned in the complainant's bill in this case?

A. Yes, sir.

Q. Those mortgages, if I understand, the land-grant mor-gages, are at the rate of ($2.50) two dollars and a half an acre?

A. Yes, sir.

Q. The bonds were then turned over to the American Improvement Company?

A. Yes, sir.

Q. In settlement of their contract for the construction of this railway?

A. Yes, sir; turned over to the trustees of the mortgage by me.

Q. But the American Railway Improvement Company got them?

A. Yes, sir.

By Judge HOWE:

Respondent offers in evidence in connection with this testimony copy of the indenture of January 5th, 1881, being the assignment or transfer of the land grant in question by the New Orleans, Baton Rouge & Vicksburg Railroad Company to the New Orleans Pacific Railway Company, copies to be filed with this testimony, marked "Respondent's Exhibit No. 1."

Also, in connection with this testimony and in connection with that paper, copy of resolution of the board of directors & of stockholders of the New Orleans, Baton Rouge & Vicksburg Railroad Company authorizing that transfer, marked "R. Ex. No. 2," & of board of N. O. P. R'y.

142 Also the acceptance of the assignment dated February 19th, 1881, and signed by E. B. Wheelock, copy to be filed and to be marked "Respondent'- Exhibit No. 3."

Also offer in this connection the letter of Mr. Teller, the Secretary of the Interior, dated March 13th, 1883, addressed to the President of the United States, with reference to the examination of the road by Mr. Hazard, and the endorsements thereof and the approval of

its recommendations by Chester A. Arthur, then President of the United States of America, dated March 16th, 1883, copies to be filed and to be marked "Respondent's Exhibits Nos. 4 & 5" respectively.

Also letter of L. Harrison, acting Commissioner of the General Land Office, Department of the Interior, dated Washington, March 22nd, 1883, addressed to E. B. Wheelock, president of the New Orleans Pacific Railway Company, concerning the definite location of the road, marked "Respondent's Exhibit No. 6."

Also answer of E. B. Wheelock to the foregoing letter, dated at New York, May 23rd, 1883, accepting the dates of the definite location as fixed by Mr. Harrison, those dates being October 27, 1881, and November 17th, 1882, as the dates of the definite location of the line of the New Orleans Pacific Railway Company, marked "Respondent's Exhibit No. 7."

By Judge HOWE:

Q. Please state whether those are the dates of definite location as accepted by you.

A. Yes; according to my recollection.

143 Q. Well, would your recollection be refreshed by looking at that letter?

A. Yes, sir; I suppose it would. I remember writing that letter in New York in May of that year.

Q. Are those dates of definite location secret?

A. Yes, sir; that's correct.

Q. As I understand, those dates of definite location were fixed by the actual construction of the road under your administration?

A. Yes, sir; part of it being completed in October, 1881, and the balance in November, 1882.

Q. Mr. Harrison states in his letter, which has been offered in evidence, as follows: "This office (meaning the General Land Office) will therefore, in the adjustment of the grant, treat the dates of the filing of the said maps, October 27th, 1881, and November 17th, 1882, as dates of the definite location of the road." Please state if Mr. Harrison is correct in saying that these maps of definite location were filed as the road was constructed—if they were sent there for that purpose to Washington.

A. Yes, sir.

By Judge HOWE:

Respondents offer in connection with the testimony of Mr. Wheelock the act of Congress passed on the 8 day of February, 1887—a copy to be filed and marked "Respondents' Exhibit No. 8."

144 Q. It is stated, Mr. Wheelock, in the pleadings in this case, in the answer and cross-bill, that after the construction of the New Orleans Pacific Railway Company and its completion, say, by the month of November, 1882, that in order to obtain the patents you have obtained for the certain lands mentioned in this case the New Orleans Pacific Railway Company was compelled to pay large expenses for surveying, selection, and conveying of

lands amounting to many thousands of dollars. Can you state in round figures about what was the actual expenses which were incurred, and necessarily incurred, and paid—I mean in connection with the Land Office, at Washington—in obtaining these patents?

A. Well, probably, to both offices, in the neighborhood of ($20,000.00) twenty thousand dollars; twenty to twenty-five thousand dollars; perhaps more.

Q. You were compelled to pay office fees of selection and surveying, etc., which were required by law wherever the patents were issued under these surveys?

A. Yes, sir; I paid the selection fees. The fees for the patents were paid in Washington and the fees for the selection were paid into the land offices here in La.

Q. But wherever paid they were paid by the land office of the New Orleans Pacific Railway Company?

A. Yes, sir.

Q. And amounted to about twenty thousand ($20,000.00) dollars for the expenses of the various kinds?

A. Yes, sir; fully that.

145 Q. Will you please state about what amount of taxes you were compelled to pay upon these lands since you obtained the patents and their recordation?

A. On the lands patented the taxes last year were about, say, from ten to twelve thousand dollars.

Q. And those have been paid?

A. Yes, sir; the taxes of 1886.

Q. And I suppose there will be very soon another call made upon you to pay the taxes for this year in a very considerable sum?

A. We will be called upon to pay taxes for 1887 on lands not sold.

(Sig.) E. B. WHEELOCK.

Sworn to and subscribed before me this — day of March, 1887.

Recalled by consent:

Q. State whether or not the New Orleans, Baton Rouge and Vicksburg Railroad Company ever built any railway in Louisiana.

A. It never did.

(Sig.) E. B. WHEELOCK.

Recalled by consent, June 16, 1887:

Witness further states: The act of February 8th, 1887, Respondents' Exhibit No. 8, has been accepted by the N. O. Pacific Railway Company according to the requirements of its third section. I present herewith a certified copy of the resolution of the company at its corporate meeting, at which more than a majority of the stock was represented (offered by respondents and marked L. G. 2);

146 the letter of the General Land Office, Department of the Interior, recognizing such compliance, and the third section is annexed to the supplemental answer, marked S. L. (offered by respondents).

Respondent also offers official letter of Secretary of the Interior, map of location of New Orleans Pacific railway, marked L. G. 3.

(Sig.) E. B. WHEELOCK.

(Sworn before Michel, notary.)

Endorsement: 94. West. dist. of La., U. S. circuit court. John D. Parker *vs.* N. O., Baton Rouge & Vicksburg R. R. Co. *et als.* Testimony of E. B. Wheelock. Exhibit "E. B. W." Offered in evidence on behalf of def'ts and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k. John T. Michel, stenographer.

146½ EXHIBIT "1," RESPONDENTS'.

This indenture, made the fifth day of January, one thousand eight hundred and eighty-one, between the New Orleans, Baton Rouge and Vicksburg Railroad Company, a corporation created and existing under and by virtue of a special act of the legislature of the State of Louisiana, approved Dec. 30th, 1869, party of the first part, and the New Orleans Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Louisiana, a party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is thereby acknowledged, and of other good and valuable consideration, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim, unto the said party of
147 the second part and to its successors & assigns forever—

All the right, title, and interest of the said party of the first part, its successors or assigns, of, in, or to a certain grant of public lands granted to the said party of the first part by an act of the Congress of the United States, approved March 3d, 1871, and entitled "An act *entitled* to incorporate the Texas Pacific Railroad Company and to aid in construction of its road, and for other purposes," together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof:

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

In witness whereof the party of the first part hath caused its corporate seal to be hereunto affixed and these presents to be assigned by its president and secretary the day and year first above written.

(Sig.) W. H. BARNUM, *President.*
(Sig.) WM. M. BARNUM, *Secretary.*

Sealed and delivered in the presence of—
(Sig.) CHAS. L. BEAMAN.
" CHAS. EDGAR MILLS.
" CHARLES NETTLETON, [SEAL.]
Commissioner for Louisiana in New York.

STATE OF NEW YORK, }
City and County of New York, } ss:

148 Be it remembered that on this fifth day of January, A. D. 1881, before me, Charles Nettleton, a commissioner of the State of Louisiana in New York, residing in said city of New York, personally appeared William H. Barnum, president, and William M. Barnum, secretary, to me well known to be the individuals named in and who executed the foregoing instrument, and acknowledged to me that they did sign, seal, and deliver the same as their free act and deed on the day therein mentioned and for the consideration, uses, and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal this 5th day of January, A. D. 1881.

[SEAL.] (Sig.) CHARLES NETTLETON,
Commissioner for Louisiana in New York,
117 *Broadway, N. Y. City.*

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Charles Nettleton, a commissioner duly appointed by the governor of the State of Louisiana to take the acknowledgement and proof of deeds and other instruments to be recorded in said State of Louisiana, do hereby certify that William H. Barnum, president, and William M. Barnum, secretary, who are personally known to me to be such officers and to be the identical persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledge- that as the president and secretary of "The New Orleans, Baton Rouge and Vicksburg Railroad Company" they signed, sealed, and delivered the foregoing in-
149 strument, with the corporate seal of the said railroad company thereto affixed, as the free and voluntary act and deed of the said com. for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this 5th day of January, A. D. 1881.

[SEAL.] (Sig.) CHARLES NETTLETON,
Commissioner of Louisiana in New York,
117 *Broadway, N. Y. City.*

Endorsement: No. 94. Exhibit "1." Offered in evidence on behalf of d'f'ts and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "2," RESPONDENTS'.

(*Extract from the Minutes of the New Orleans Pacific Railway Company of February 3rd,* 1881.)

"Resolved, That the president of this company be, and he is hereby, authorized to accept the transfer of this company from the New Orleans, Baton Range and Vicksburg Railroad Company, of the land grant made to the latter by the act of Congress of March

3rd, 1871, and to execute any documents necessary to evidence the acceptance of said transfer."

A true copy.

[SEAL.] (Sig.) WM. S. NICHOLSON,
Act'g Sec'y.

150 Office of the New Orleans, Baton Rouge and Vicksburg Railroad Company, No. 150 Broadway.

NEW YORK, *Dec.* 29, '80.

At a special meeting, duly called, of the board of directors of the New Orleans, Baton Rouge and Vicksburg Railroad Company, held this day at the office of the company, there was present a quorum of the board.

In the absence of the president of the company, Mr. Simpson was called to the chair.

On motion, duly seconded, the following resolution was unanimously adopted:

Resolved, That the president and secretary of this company be, and they are, authorized to transfer to the New Orleans Pacific Railroad Company, on such terms as they shall see fit, all the right and interest of this company in and to the land granted to this company by an act of Congress approved March 3rd, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," and to make and execute in the name of this company such deed or instrument as shall be necessary to complete such transfer.

On motion, the meeting was adjourned subject to the call of the president.

(Sig.) WM. M. BARNUM, *Secretary.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Wm. M. Barnun, being duly sworn, says that he is secretary
151 of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and that the above is a true copy of the minutes of a meeting of the said company held on the 9th day of December, 1880.

(Sig.) WM. M. BARNUM.

Sworn to before me this 30 day of December, 1880.

[SEAL.] JAS. G. JANEWAY,
Notary Public (*No.* 42), *N. Y. County.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Wm. A. Butler, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that Jas. G. Janeway, before whom the annexed deposition was taken, was at the time of

taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 30 day of Dec., 1880.

[SEAL.] (Sig.) WM. A. BUTLER, *Clerk.*

Minutes of a meeting of stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company, No. 20 Camp street, on the 9th day of December, A. D. 1881, from the hours 12 m. to 2 p. m.

The meeting having been organized by the selection of
152 E. B. Wheelock as president and Thomas F. Maher as secretary, the following resolution was presented:

Resolved, That the action of the board of directors and officers of this company in transferring to the New Orleans Pacific Railway Company all the right, title, and interest of this company to the lands granted to this company by act of Congress approved March 3, 1871, and entitled "An act to incorporate the Texas Railroad Company and to aid in the construction of its road, and for other purposes," be, and it is hereby, approved, ratified, and confirmed.

And said resolution having been voted upon was passed unanimously, 42,775 shares voting therefor.

The president stated that the next business in order was the election of a board of directors of the said company, and the following ticket of names was presented:

Charles J. Canda, Lucien Birdseye, Allen McCulloh, N. B. Stevens, S. S. Brooks, Edward E. Hooper, John W. Simpson, Jas. G. Janeway, Wm. H. Barnum, Charles C. Deming, David S. Droper, Wm. L. Scott, Willis Gaylord.

And there being no other nominations, the election was proceeded with, Messrs. J. W. Patton and L. L. Davis, of New Orleans, being duly appointed commissioners of election to receive, count, and return the votes; and, the votes having been duly cast, the commissioners made their return, which is hereto annexed and made part of these minutes, as follows:

NEW ORLEANS, *December 9th*, 1881.

153 We, the undersigned, commissioners of an election held in this city, at the office, No. 20 Camp street, to receive and count the votes cast to choose a board of directors of the New Orleans, Baton Rouge and Vicksburg Railroad Company, hereby certify that the following votes were cast, to wit:

	Shares.
Wm. M. Barnum	35,001
B. G. Clarke	20
J. Counsellor	600
G. W. Cochran	6,150
David Smith	1,000
Charles C. Deming	1
James G. Janeway	1
Allan McCulloh	1
John W. Simpson	1
	42,775

The said votes were cast as follows:

For Directors.

1. Chas. J. Canda	42,775
2. M. B. Stevens	42,775
3. John W. Simpson	42,775
4. Chas. B. Deming	42,775
5. Willis Gaylord	42,775
6. Lucien Birdseye	42,775
7. S. S. Brooks	42,775
8. Jas. G. Janeway	42,775
9. Allan McCulloh	42,775
10. Edward Hooper	42,775
11. Wm. H. Barnum	42,775
12. Wm. L. Scott	42,775
13. David S. Draper	42,775

(Sig.) J. W. PATTON,
" LAWSON L. DAVIS,
Commissioners.

Board of Directors.

154	Chas. J. Canda,	Lucien Birdseye,	Wm. H. Barnum,
	N. B. Stevens,	S. S. Brooks,	Wm. L. Scott,
	John W. Simpson,	Jas. G. Janeway,	David S. Draper,
	Charles C. Deming,	Allen McCulloh,	Willis Gaylord,
		Edward E. Hooper.	

I hereby vote for the foregoing names as directors of the New Orleans, Baton Rouge and Vicksburg Railroad Company under proxy of the following stockholders: Wm. M. Barnum, 35,001 shares; B. G. Clarke, 20 shares; J. Counsellor, 600 shares; G. W. Cochran, 6,150 shares; David Smith, 1,000 shares; Charles C. Deming, 1 share; James G. Janeway, 1 share; Allan McCulloh, 1 share; John M. Simpson, 1 share.

(Sig.) E. B. WHEELOCK, *Attorney.*

New Orleans, December 9, 1881.

(Indorsement:) Board of directors to be elected.

And it appearing by said return that 42,775 shares were duly voted for the said candidates, and that the said candidates were duly and unanimously elected, the president of the meeting so declared.

And there being no other business before the meeting, the meeting adjourned at 2 o'clock p. m.

(Sig.) THOS. F. MAHER, *Secretary.*

New Orleans, December 9, 1881.

Endorsement: No. 94. Exhibit "2." Offered in evidence on behalf of def'ts and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

155 EXHIBIT "3," RESPONDENTS'.

NEW ORLEANS PACIFIC RAILWAY COMPANY,
OFFICE OF THE PRESIDENT,
NEW ORLEANS, *February* 19, 1881.

SIR: In pursuance of the resolution of the board of directors of the New Orleans Pacific Railway Company, passed February 3, 1881, I hereby accept, in behalf of said company, the deed and transfer executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company, bearing date January 5, 1881, conveying all its rights, title, and interest in, to, and under the land grant made by section 22 of the act of Congress approved March 3, 1871.

(Sig.) THE NEW ORLEANS PACIFIC RAILWAY CO.,
By E. B. WHEELOCK, *President.*

Hon. W. H. Barnum, president N. O., B. R. and V. R. R. Co., 52 William St., N. Y.

Received the within acceptance this 23rd day of February, 1881.

THE NEW ORLEANS, BATON ROUGE AND VICKSBURG RAILROAD CO.,
(Sig.) By WM. H. BARNUM, *Secretary.*

(Indorsements:) 1377, C. 6. Department of the Interior, lands and railroad division. Received October 29, 1881.

Endorsement: No. 94. Exhibit "3." Offered in evidence on behalf of def'ts and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

156 EXHIBITS "4" & "5," RESPONDENTS'.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 13, 1883.

SIR: The New Orleans Pacific Railway Company applied to this department more than a year ago for a transfer to itself of the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the twenty-second section of the act of Congress approved March 3, 1871, presenting at the same time satisfactory proofs of said transfer as between the two companies. I have delayed action thereon for many months, against the persistent pressure of parties in interest, in the expectation that Congress might

legislate upon the subject-matter thereof; but that body having adjourned without action thereon, and knowing of no reason for further delay, I have now the honor to submit the same for your consideration.

In reply to my predecessor's request of January 5th, 1882, the Attorney General, under date of June 12 ultimo, submitted to him an opinion (copy herewith) that the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company was a grant *in presenti*; that that company had an assignable interest in the lands granted to it; that the New Orleans Pacific Railway Company is such a successor to or assignee of the New Orleans, Baton Rouge and Vicksburg Company as is contemplated by the act of March 3, 1871; that even if the New Orleans, Mobile and Texas road was constructed subsequently to the date of said act, so much of its road as is now owned by the New Orleans Pacific Company is
157 such a road as is contemplated for acceptance by the president within the meaning of said act, and that patents may issue to the latter company for lands opposite to and coterminous with such constructed portion of road.

I also submit herewith a copy of the report of the Senate Committee on Railroads (under date of June 7, 1882), declaring that, in its judgment, no considerations of public policy require a forfeiture of the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company; and also two letters (herewith), under date of December 15 last, from Hon. L. E. Payson, of the House Judiciary Committee, in one of which he notifies this department that upon that day, at a meeting of the committee, he had formally withdrawn the pending resolution offered by him at the previous session of Congress for a forfeiture of said grant. In the other, after stating his request in October last for a suspension of department action until he could be heard before the House Judiciary Committee upon the matter, he elaborately discusses the questions involved, and announcing that, after conference with them, the Senators and House delegation from Louisiana interpose no opposition to immediate action by this department, and that his own objections are disposed of and withdrawn, states his conclusions that the New Orleans Pacific company is entitled to the grant, both under the law and the equities of the case, and the rights of settlers are fully protected.

I have also the honor to submit herewith two reports on
158 the New Orleans Pacific railway by Mr. Thomas Hassard, whom you appointed commissioner to examine completed portions of said railway.

The first report bears date 26th October, 1881, and has not been submitted to you at an earlier date on account of the controversies heretofore in question.

The portions of said railway examined and at that time reported on extend from the west bank of the Mississippi river, opposite Thalia street, New Orleans, La., in a northwesterly direction near said river, sixty miles, to near the town of Donaldsonville, in T. 11 S., R. 15 *T.*; also from Bayou Lamourie, in T. 2 N., R. 1 E., to a point in T. 4 N., R. 2 W., a distance of 20 miles; also from the

junction of said railway with the Texas and Pacific railway, in Shreveport, La., southwardly to T. 10 N., R. 12 W., a distance of 50 miles.

The second report bears date 15 of November, 1882, and relates to such portions of said railway as were not examined and reported on in October, 1881, amounting to 198 miles, lying between New Orleans and Shreveport.

The commissioner reports said portions of road, 328 miles in all, as constructed in substantial compliance with law and the instructions of this department.

In view of the facts and the law of the case, I regard the New Orleans Pacific Railway Company as the lawful assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and entitled to the lands granted by the twenty-second section of the act of March 3, 1871, to said latter-named company, and to patents
159 therefor in so far as it has earned or may hereafter earn the same under that act, with the exception below named, and recommend that you accept said 328 miles of said road, less and exclusive of 68 miles of the line of said New Orleans, Baton Rouge and Vicksburg road, extending from New Orleans to White Castle, between New Orleans and Shreveport (to which 68 miles the New Orleans Pacific road has withdrawn its claim and right to receive lands under the twenty-second section of said act), and that patents for such lands as may have been earned by the construction be issued to the New Orleans Pacific Railway Company (exclusive, nevertheless, of lands along said 68 miles) on their compliance with the law and regulations in such case made and provided.

These patents will, of course, be subject to rights acquired by any person or corporation prior to the act of March 3, 1871.

Requesting that the enclosures herewith be returned to this department when no longer needed for the purposes hereof,

I am, very respectfully,

(Sig.) H. M. TELLER, *Secretary.*

The President.

(Indorsements.)

DEPARTMENT OF THE INTERIOR, *March* 13, 1883.

H. M. Teller, Secretary, submits to the President report of commissioner on 328 miles of the New Orleans Pacific railroad, with recommendations.

EXECUTIVE MANSION, *March* 16, 1883.

The within recommendations are approved.

(Sig.) CHESTER A. ARTHUR.

160 Endorsement: No. 94. Exhibits "4" & "5." Offered in evidence on behalf of def'ts and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "6," RESPONDENTS'.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 22, 1883.

SIR: On the 19th March last the Hon. Secretary of the Interior transmitted to this office a copy of his letter of the 13th March, to the President, enclosing two reports of Mr. Thomas Hassard, commissioner, on 328 miles of the New Orleans Pacific railroad in Louisiana, and recommending that said 328 miles of road be accepted, less and *in*clusive of 68 miles thereof, extending from New Orleans to White Castle, and that patents for such lands as may have been earned by the construction be issued to the New Orleans Pacific Railroad Company, with the President's indorsement thereon approving the recommendations. The Honorable Secretary also transmitted two maps showing the line of route of said road as constructed from New Orleans to Shreveport.

One of said maps shows three sections, comprising 130 miles of road, as follows: Sixty miles, extending from a point on the Mississippi river opposite New Orleans to a point near Donaldson-
161 ville; 20 miles, extending from a point in T. 2 N., R. 1 E., to a point in T. 4 N., R. 2 W., and 50 miles, extending from the junction with the Texas and Pacific railway, in Shreveport, La., to a point in T. 10 N., R. 12 W. This map was filed in the department October 17, 1881.

The second map, which was filed in the department November 7, 1882, covers such portion- of said road as are not shown upon the first map.

The said maps bear the affidavits of the chief engineer and acting chief engineer respectively (sworn to October 17th, 1881, and November 11, 1882, respectively) to the effect that the sections of road shown thereon have been completed and equipped as required by law, and that the line of route shows the correct location of the road. They also bear your certificate, as president of the company, to the effect that the location of the road as represented thereon is correct and has been approved by the company (date or dates of such approval not given), and that the road has been completed and equipped as required by law.

The act of March 3, 1871, twenty-second section, grants to the New Orleans, Baton Rouge and Vicksburg Railroad Company (of which the New Orleans Pacific Railway Company is the assignee), its successors and assigns, the same number of alternate sections of public lands per mile in the State of Louisiana as are by said act granted in the State of California to the Texas Pacific Railroad Company. The land granted by said — in the State of Cali-
162 fornia to the Texas Pacific Railroad Company are ten alternate sections of public land per mile, not mineral, designated by odd numbers, on each side of such line as the company may adopt, where the same shall not have been sold, reserved, or other-

wise disposed of, or to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.

You will readily observe from the terms of the grant that the date of a definite location of the road is the governing date in the adjustment thereof.

As regards definite location, the usual course is for the railroad company to file, in advance of construction, a map showing the line of route of its road in connection with lines of the public surveys, with certificates showing that such line has been adopted by the company as the definite location of the line of its road, and the date of such adoption.

The filing in and acceptance of such a map by the department is generally held to constitute definite location. In the present case no map of definite location was filed in advance of construction.

On the 18th instant, however, the Hon. Secretary of the Interior referred to this office for consideration your letter of the 8th instant, transmitting a map purporting to show the line of said road as definitely fixed. This map bears the affidavit of the chief engineer of the company, sworn to April 24th, 1883, to the effect that
163 the survey and actual location of the line of route of said road from White Castle to Shreveport was made between August, 1875, and December, 1880, and from New Orleans to Westmego during the month of May, 1881. It also bears your sworn certificate, dated May 7, 1883, to the effect that the line of route of said road was located by the chief engineer of the company in conformity with a resolution of the board of directors adopted on the 12th day of August, 1875, as the definite location of the road from White Castle to Shreveport and from New Orleans to Westmego, and that the dates of the actual location are correctly shown on the map.

You ask that the dates shown on said map be recognized as the dates on which the line of the road was definitely fixed.

In the case of Van Wyck *v.* Knevals, decided by the Supreme Court at its October term, 1882, the line of the Saint Joseph and Denver City railroad (act July 23, 1886, 14 Stats., 110) was held to have been definitely fixed when, through the filing with and acceptance of a map thereof by the Secretary of the Interior, it had ceased to be the subject of change at the will of the company. The department has generally held that a roard is definitely located when the line is so fixed that it cannot thereafter be changed in any material particular without the consent of the granting power. (See Cop's L. O., vol. 1, p. 164.)

That portion of the road between New Orleans and Westmego was expressly excluded from the President's acceptance, and therefore the date of the definite location of such portion is of no
164 consequence to this office. The portion between White Castle and Shreveport was surveyed and located between August, 1875, and December, 1880.

The assignment of the grant to the New Orleans Pacific Railway Company was executed January 5, 1881, and the deed of such assignment was filed in the office February 17th, 1881.

It can hardly be claimed that the New Orleans Pacific road was at any time between 1875 and 1880 so fixed that it could not have been changed without the consent of the granting power. The company had then no claim to the grant, nor standing before this department, and could have changed its line at its pleasure.

It must therefore decline to recognize the dates shown on said map as the dates of the definite location of the road in question.

The first maps showing the location of the road which were filed in the department were the maps of constructed road, and, as actual construction is the best possible definite location, I am of the opinion that the filing of said maps should be held to be the definite location of the respective sections of road shown thereon.

This office will therefore, in the adjustment of the grant, treat the dates of the filing of said maps (October 27, 1881, and November 17, 1882) as the dates of the definite location of the road.

You will be allowed sixty days from the receipt of this
165 letter within which to appeal to the Secretary of the Interior, should you so desire.

Very respectfully,

(Sig.) L. HARRISON,
Acting Commissioner.

(*Sig.*) E. B. Wheelock, Esq., pres't New Orleans Pacific Railway Company, N. Y. city.

Endorsement: No. 94. Exhibit "6." Offered in evidence on behalf of def'ts and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "7," RESPONDENTS'.

NEW YORK, *May* 23*rd*, 1883.

SIR: Yours of May 22 was duly received. I accept the dates of the definite location of the New Orleans Pacific railway as fixed by you and have no appeal to make from your decision. You will please make the necessary orders to the land offices at New Orleans and Natchitoches to recognize the definite location as decided by you. Please inform me how soon you will furnish a map to these offices showing the limits of the grant. If it can be expedited by my company paying for any additional force needed to prepare the map, I shall do so with pleasure.

I take it for granted that there can be no further question to decide, as the definite location once determined, the limits of the grant are readily defined.

Very respectfully,

166 (Sig.) E. B. WHEELOCK,
President New Orleans Pacific Railway Co.

Hon. Luther Harrison, acting Commissioner Gen'l Land Office, Washington, D. C.

Endorsement: No. 94. Exhibit "7." Offered in evidence on behalf of defendants and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "L. G. 2," RESPONDENTS'.

Meeting of Stockholders New Orleans Pacific Railway Company.

NEW ORLEANS, *April 14th*, 1887.

At a meeting of the stockholders held this day the following resolution having been offered was duly adopted:

Whereas the board of directors of this company have duly adopted the following resolutions, to wit:

Whereas the Congress of the United States has duly adopted an act approved February 8th, 1887, entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes," and it is provided in the third section thereof as follows: "That the relinquishment of the lands and the confirmation of the grant provided for in the second section
167 of this act are made and shall take effect whenever the Secretary of the Interior is notified that said New Orleans Pacific Railroad Company, through the action of a majority of its stockholders, has accepted the provisions of this act and is satisfied that said company has accepted and agreed to discharge all the duties and obligations imposed upon the Baton Rouge & Vicksburg Railroad Company and to aid in the construction of its road, and for other purposes:"

Now, therefore, be it resolved by the board of directors of the New Orleans Pacific Railroad Company that the provisions of the said act of Congress are hereby accepted, and that the company do also accept and will discharge all the duties and obligations imposed upon the New Orleans, Baton Rouge & Vicksburg Railroad Company by the act of March 3rd, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes.

Resolved, That a meeting of the stockholders of the company be called for Thursday, the 14th of April, 1887, at 12 m., for the purpose of accepting the provision of said act of Congress of Feb. 8th, 1887, and accepting and agreeing to discharge the said duties and obligations imposed upon the said New Orleans, Baton Rouge & Vicksburg Railroad Company by said act of 1871:"

Therefore be it resolved by this meeting, representing sixty-seven thousand shares out of the sixty-seven thousand two hundred
168 shares issued and outstanding, that the above resolution be, and the same hereby is, in all things ratified and confirmed; that this company does hereby accept the provisions of the said act of Congress of February 8th, 1887, and also accepts and will discharge all the duties and obligations imposed on the New Orleans, Baton Rouge & Vicksburg Railroad Company by said act of Congress of March 3rd, 1871.

Resolved, That the said board of directors are hereby authorized and directed to adopt any and all resolutions, and the president and secretary of this company to execute any and all instruments, under

corporate seal or otherwise, necessary to complete, consum-ate, or evidence such acceptance of said act of February 8th, 1887, and to execute any instruments required or needful whereby this company agrees to discharge all duties and obligations imposed upon the New Orleans, Baton Rouge & Vicksburg Railroad Company by act of March 3rd, 1871, entitled *an* "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

There being no further business to transact, the meeting adjourned.

(Signed) ROBERT STRONG, *Secretary.*

Approved.

(Sig.) E. B. WHEELOCK, *Pres'd't.*

I certify the above to be a true & correct copy.

[Seal New Orleans Pacific Railway Company.]

(Sig.) ROB'T STRONG, *Secretary.*

169 Endorsement: Meeting of stockholders, New Orleans Pacific railway. No. 94. L. G. 2. Exhibit "L. G. 2." Offered in evidence on behalf of def't and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

EXHIBIT "R 9," RESPONDENTS'.

New Orleans Pacific Railway Company's Land-Grant and Sinking-Fund Mortgage.

This indenture, made this 17th day of April, 1883, between the New Orleans Pacific Railway Company, a corporation created by and existing under the laws of the State of Louisiana, party of the first part, and hereinafter called the railway company, and John F. Dillon, of the city of New York, and Henry M. Alexander, of the city of New York, parties of the second part, hereinafter styled the trustees, witnesseth:

That whereas the said railway company is authorized, under the laws of Louisiana, to build and equip a line of railway from the city of New Orleans or from any point on the Mississippi river below the parish of Iberville, on the west bank, or the city of Baton Rouge, on the east bank, or from Berwick's bay, or from any other point in the State of Louisiana to Shreveport, in the State of Louisiana, and such branches as it may desire to build;

170 And whereas the Congress of the United States, by an act approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," enacted, *inter alia*, that for the purpose of aiding in the construction of the railroad and telegraph line of the said Texas Pacific Railroad Company there be, and is hereby, granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad in California,

where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a valid pre-emption or homestead claim may not have attached at the time the road is definitely fixed;

And whereas said last-mentioned act of Congress, in the twenty-second section thereof, enacted as follows:

SEC. 22. That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect, by the most eligible route to be selected by said company, with the said Texas Pacific railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company, and in aid of its construction from New Orleans to Baton Rouge, thence by way of Alexandria, in said State, to connect
171 with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile in the State of Louisiana as are by this act granted in the State of California to said Texas Pacific Railroad Company, and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California"—

As will more fully appear by reference to the said act of Congress, which is deemed to be incorporated herein as fully as if the same were herein set out at length;

And whereas the said congressional land grant was made by Congress to the said New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns;

And whereas the said New Orleans, Baton Rouge and Vicksburg Railroad Company has transferred and assigned its right to the said land grant to the said New Orleans Pacific Railway Company, which said last-mentioned company has accepted the same without, however, assuming or becoming liable for any of the debts, obligations, claims, or charges of the New Orleans, Baton Rouge and Vicksburg Railroad Company;

And whereas the said New Orleans Pacific Railway Company has surveyed and located a line of road from New Orleans to Shreveport in the same general direction of the line or route
172 of the said New Orleans, Baton Rouge and Vicksburg Railroad Company, by reason whereof and of the said assignment and the recognition of the same by the Land Department of the General Government the said New Orleans Pacific railway claims to be and is entitled to the benefit of the said land grant;

And whereas the said New Orleans Pacific Railway Company has, at the date of delivery hereof, constructed and completed its said line of railroad;

And whereas the said New Orleans Pacific Railway Company, in order to provide the means of payment for the said land grant, so as aforesaid assigned to it, and for the construction of said railroad,

and for other purposes, is by law authorized and is determined to issue bonds and to execute in the corporate name of the said company a mortgage on the said lands to secure the payment of the said bonds, each of which bonds to be for the sum of one thousand dollars, payable to bearer on the first day of July, A. D. 1911, and in the following form, viz:

No. —. UNITED STATES OF AMERICA, *State of Louisiana.* $1,000.

Land-grant and sinking-fund bond of the New Orleans Pacific Railway Company, secured by mortgage on the lands embraced in the congressional land grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company, or the proceeds thereof.

173 Know all men by these presents that the New Orleans Pacific Railway Company, for value received, promises to pay to the bearer, or in case the bond is registered, then to the registered holder, out of the mortgaged lands or the proceeds of the sales thereof, in the manner hereinafter stated, the sum of one thousand dollars, on the first day of July, nineteen hundred and eleven, at its agency in the city of New York, with interest thereon at the rate of six per cent. per annum, on the first days of January and July in each year.

This bond is one of a series of bonds of like tenor and date secured by a mortgage of even date herewith, duly executed and delivered by said New Orleans Pacific Railway Company to John F. Dillon and Henry M. Alexander, trustees, conveying, as set forth in the said mortgage, all the lands acquired or to be acquired by said company, as assignee of the said New Orleans, Baton Rouge and Vicksburg Railroad Company, under an act of Congress approved March 3, 1871, and is payable, principal and interest, as provided in said mortgage, only out of the said lands or the proceeds of the sales thereof.

This series of bonds is limited to an issue of two dollars and fifty cents per acre on the number of acres of land which shall be patented or certified to or for the New Orleans Pacific Railway Company, which company, it is agreed, shall not be liable for payment of either the principal or interest of this bond, beyond the extent of the lands conveyed by mortgage as above set forth.

174 The holder of this bond is entitled to the benefit of the sinking fund provided for in the said mortgage, and said mortgage contains a provision for the receipt of the said bonds, at par and accrued interest, in payment for lands at a price to be fixed by disinterested appraisement or by arbitration.

The interest on this bond, if demanded by the holder in cash, is payable only out of the net proceeds of the sales of the mortgaged, and shall be deemed fully paid on payment in cash of such proportion of six per cent. per annum as the *pro rata* distribution of the said net proceeds for the next preceding six months will permit; but if the holder of this bond shall elect to use the same in payment of any of the lands mortgaged, it shall in that event be receiv-

able at the par of principal and accrued interest, at the rate of six per centum per annum, in payment for said lands.

The said bond does not become a valid obligation upon the company until the certificate, endorsed hereon, is signed by said trustees.

In witness whereof the said company has hereunto caused to be fixed its corporate seal and these presents to be executed by its president and attested by its treasurer this — day of ——, 1881.

—— ——, *President.*

—— ——, *Treasurer.*

(*Trustees' Certificate.*)

It is hereby certified that this bond is one of the bonds secured by the said land-grant and sinking-fund mortgage, and that
175 it is issued in conformity with its provisions.

—— ——,
—— ——,
Trustees.

No bonds are to be issued under this indenture before the lands in the land grant are patented or certified to or for the benefit of or acquired by the said New Orleans Pacific Railway Company, and as fast as lands are thus patented or certified or the title thereto acquired by the New Orleans Pacific Railway Company bonds may be issued hereunder from time to time at a rate not exceeding two dollars and a half per acre, and all bonds issued and certified hereunder shall stand equally secured hereby, irrespective of the date of actual issue or negotiation; and the said railroad covenants and agrees with the said trustees, for the benefit of whoever shall become holders of bonds issued hereunder, that it will not issue bonds at any greater rate than at the rate of two dollars and a half per acre for lands actually patented or certified or acquired by it at or before the time when said bonds are issued.

And whereas this indenture and the bonds secured thereby have been authorized by the board of directors of the party of the first part:

Now, therefore, this indenture witnesseth that the said New Orleans Pacific Railway Company, in consideration of the premises and of one dollar to it in hand paid by the parties of the second part, receipt whereof is hereby acknowledged, in order to secure in the manner herein provided the payment in the manner herein
176 provided of the sums of money mentioned in the said bonds, and interest thereon, issued or to be issued, as in this indenture set forth, has granted, bargained, sold, assigned, conveyed, and confirmed, and by these presents doth grant, bargain, sell, convey, assign, and confirm, unto the said parties of the second part, as trustees, as joint tenants and not as tenants in common, and to their survivor or successor or successors and their heirs and assigns forever, all and singular the *the* said several sections of land, and each and every part thereof, granted as aforesaid to the said New Orleans, Baton Rouge and Vicksburg Railroad Company by the said act of Congress, approved March 3, 1871, estimated to contain from one

million five hundred thousand to two million acres of land; and also all the estate, right, title, interest, claim, and demand whatsoever, at law or in equity, of, in, or to the same or any part or parcel thereof, which the said New Orleans Pacific Railway Company now has, holds, owns, or is entitled to or hereafter may or shall acquire, hold, own, or be or become entitled to by force or virtue of the said act of Congress, saving, excepting, and reserving, however, from this indenture all parts and parcels of the said lands which are or shall be included in the railroad of the said New Orleans Pacific Railway Company or used for the construction or operation thereof or for the tracks, yards, depot grounds, not exceeding twenty acres, at any one station, buildings, or erections thereof:

177 To have and to hold all and singular the *the* premises hereby granted or intended to be, with all the appurtenances thereunto belonging, unto the said parties of the second part, as joint tenants, and their successors and survivor, and their and his heirs and assigns, as trustees, for the uses and purposes and upon the trusts and agreements in this indenture set forth and declared, and subject to the provisions and requirements of the aforementioned act of Congress, it being well understood that each and all of said lands are by this instrument intended to be and are mortgaged, hypothecated, and affected in favor of said trustees and of each and every holder of said bonds or any of them for the securing of each and every obligation created and evidenced by said bonds. The said bonds hereby secured do not, nor does this indenture, impose any liability *in personam* on the party of the first part or its successor or their stockholders and is no lien or charge on any property except the property herein and hereby mortgaged.

The aforesaid mortgage and conveyance is executed and delivered upon the trusts, terms, conditions, and agreements following—that is to say:

That all of the lands herein conveyed and mortgaged and intended to be shall be under the sole and exclusive management and control of the said party of the first part or its successor by merger, consolidation, purchase, or otherwise, which shall have full power and authority to make and sign contracts for the sale of said

178 lands at such price and on such credit or terms of payment, taking the notes or obligations of the purchasers, in the name of the trustees, and such other conditions as may be agreed upon by the said party of the first part or its said successor and said trustees for the time being and as shall seem to them best calculated to secure the payment in full of the said bonds, issued as hereinbefore provided, until entry or foreclosure by the trustees, as hereinafter provided; but no title deed for any of the lands contracted to be sold by said party of the first part or its successor as aforesaid shall be given or the lien of this indenture released until the whole purchase-money of said lands shall be paid over to the said trustees in cash or in the bonds secured hereby. To this end it is agreed that the said first party hereto or its successor and the said trustees or their survivor- or successors shall cause all of such lands as shall from time to time be patented or certified by the United States to or

acquired by the company and become subject to sale to be carefully appraised at their fair actual selling value by two disinterested persons, one to be selected by the railway company and the other by the trustees, and if these two cannot agree they shall select a third appraiser, the decision and action of a majority of whom shall stand as the appraisement until it is altered as hereinafter provided.

The appraisers shall affix to each section or subdivision thereof such price as in their judgment shall be the fair actual selling
179 value, and said lands shall be and remain at all times thereafter open to sale to any person who may desire to purchase and pay therefor. Such appraisements may be changed from time to time, and are at all times subject to revision and alteration by the said parties in the manner aforesaid.

Bondholders to the amount of one-fourth of the outstanding bonds may at any time make a written demand upon the parties for a reappraisement, by disinterested persons, of all or any part of said lands, in which case said bondholders may select one person and the parties hereto another, and, if necessary, the two a third, who may reappraise the said lands or any part thereof, which appraisement shall stand for one year at least, unless a like reappraisement shall be made. After a year the parties hereto may cause the said lands to be again appraised, subject to having their action in this regard controlled by a reappraisement, in the manner aforesaid, by other persons selected by the bondholders and parties hereto as aforesaid.

No land covered by the right of way of the road or necessary for depot grounds or other purposes connected with the construction or operation of the railroad, not exceeding twenty acres at any one station as aforesaid, shall be appraised or sold, the same not being covered by this indenture.

The said parties hereto may authorize a sale to persons intending to purchase for actual settlement and certification a large quantity of lands, or for other special reasons, which
180 to the said parties hereto make it appear to the advantage of all parties concerned that such sale shall be made, but only on condition that the president of the railway company and the trustees shall file with the secretary of the railway company the resolution of the company, and also a written statement, under oath, of the reasons for such sale at the reduced price, and that the same is made in good faith and because in their judgment it is for the best interests of all concerned that it should be made.

The purchase- of any of the lands embraced in this indenture shall be at liberty to pay for the same in the bonds secured hereby at par and accrued interest, and when any tract or parcel of the said lands have been purchased and paid for as aforesaid or in cash, and the proceeds of such payment received by the trustees, the land shall be conveyed by the said trustees or their survivor or successor or successors to the purchaser, and shall by such conveyance stand absolutely and forever released from any and all lien or incumbrance for or on account of said bonds or this indenture.

It is expressly agreed by the holder of each bond secured

hereby that the interest on this bond, if demanded by the holder in cash, shall be, and is, payable only out of the net proceeds of the cash sales of the mortgaged lands, and such interest shall be deemed fully paid on the payment in cash of such
181 proportion of six per cent. per annum as the *pro rata* distribution of the said net proceeds for the next preceding six months will permit; but if the holder of this bond shall elect to use the same in payment for any of the lands mortgaged it shall, in that event, be receivable at the par of principal and accrued interest at the rate of six per cent. per annum (without compounding interest) in payment for said lands. Lands must be taken in congressional subdivisions, and any fractional difference between the purchase price of the lands purchased and the amount of the principal of the bonds and accrued interest thereon shall be paid by the purchaser in money. The consideration money in any sales of land embraced in this indenture may be paid, either in whole or in part, by delivering to said trustees to be cancelled one or more of said bonds which may have been used as aforesaid at their par value and interest accrued; and two or more purchasers of said lands may unite and pay a part or all of the aggregate amount of their purchases by delivering to said trustees said bonds to the amount of such payment to be cancelled.

In case the sum of such purchase-money shall not amount to the value of the bond or bonds, with their accrued interest, so surrendered, then the land commissioner of the party of the first part shall, in *their* discretion, have authority to issue a certificate repre-
182 senting the amount in excess due said purchaser, such certificate to be receivable for land only, and without interest.

It shall be the duty of the trustees to cancel all bonds received in payment for lands by defacing the seal of the corporation and perforating the signatures of the president — treasurer.

The proceeds of all sales of land, when received in cash, are to be applied by the trustees as follows:

First. To the payment of the necessary expenses of the trust and the procuring, surveying, appraising, advertising, and selling and conveying of the lands as herein provided.

Second. The payment of taxes.

Third. To the payment of interest upon said bonds. If it is found at the expiration of an interest period that the net proceeds from the sales of land are not sufficient to pay the six (6) months' interest then due, a *pro rata* dividend may be declared by the trustees upon such bonds as may then be outstanding, and the dividend so declared shall be advertised for thirty days in one or more daily newspapers in the cities of New York and New Orleans, and its acceptance by the bondholders shall be deemed a payment in full of all interest due and be so endorsed upon the bond.

If the bondholder does not accept the same and elects to use the bond, with its accrued interest, in the payment of lands, then the amount of such cash dividend shall be carried to and become
183 part of the sinking fund.

Fourth. Any residue shall be carried to and shall constitute

a sinking fund. All money coming into the sinking fund shall from time to time be used by the trustees in the purchase of the bonds secured hereby in the market at the lowest price at which they can be procured, not exceeding the par thereof. It is expressly agreed between the parties hereto and all holders of bonds secured hereby that the bonds secured hereby, including the overdue interest thereon, shall be at all times receivable as aforesaid herein provided in payment for the lands herein embraced at the appraised price.

If default shall be made in the payment as herein provided of interest on any of the said bonds, and such default shall continue for the space of two years after demand in writing at the place of payment, then the trustees *may*, and on being requested in writing by the holders of at least one-fourth (¼) of the outstanding bonds *shall*, enter into and take possession of any of the lands herein contained, and foreclose this mortgage by a sale at public auction of so many of the said lands as may be necessary to discharge all arrears of interest, and apply the proceeds, after deducting the costs, charges, and expenses, to the payment of such arrears of interest. If such default shall continue for the space of *three* years from the time of such demand and refusal, the principal of all of the said bonds then outstanding shall, unless waived as hereinafter provided,
184 become due and payable, and the trustees may, and on being requested by the holders of one-fourth of the said bonds then outstanding shall, enter into and take possession of all lands hereby mortgaged, and foreclose this mortgage by selling the lands at public auction, in the city of New York or New Orleans, as they may elect, or so many of said lands as may be necessary, first giving at least one month's previous notice of the time and place of such sale in at least one newspaper published in the city of New York and one in the city of New Orleans, briefly describing the lands by general description and the time and place of sale; and they shall apply the proceeds of such sale, after deducting the costs, charges, and expenses of the trust, to the payment of all of the said bonds then outstanding and interest accrued thereon, rendering the overplus, if any, to the party of the first part or its successors or assigns. Upon such sales the trustees are authorized to execute and deliver conveyances, which shall convey to the purchaser an irredeemable title to the said lands, free from any right or equity of the said railway company, its successors — assigns, to redeem the same.

The proceedings above contemplated for a sale as aforesaid, by virtue of the power herein as aforesaid, are *cumulative* and do not preclude a foreclosure in judicial tribunals.

185 A majority of the outstanding bonds in number and value may at any time, in writing, waive any default in respect of either interest and principal, and thereby prevent a foreclosure for the time being by the trustees in either of the modes herein provided for, and such *such* majority may waive in like manner any subsequent default under this instrument at any time before a sale is made hereunder or decree of foreclosure is entered.

Whenever all the bonds secured hereby, with interest thereon,

and all the expenses incurred by the trustees hereunder shall have been fully paid the trustees shall reconvey the said property not before that time sold or disposed of to the said party of the first part, its successors or assigns.

In case the said trustees shall at any time have any trust moneys on hand derived from a sale of lands hereby conveyed which will not be required to meet any immediate liability to which the said moneys are by these presents devoted, the said moneys may be deposited on interest with some bank or trust company in the city of New York, subject to be drawn by check signed by the trustees or such one of them as they may designate.

All of the books of the railway company and of the trustees relating to the lands or to this trust shall be open to the inspection of the company and the said trustees and the bondholders secured hereby.

The said trustees shall not certify or deliver bonds here-
186 under in excess of or at a greater rate than at the rate of two dollars and a half ($2.50) per acre for lands actually patented or certified by the United States under the land grant aforesaid either to the New Orleans Pacific Railway Company or for its benefit or which shall be acquired by that company so as to fall within the security of this indenture.

Meetings of the holders of the said bonds hereby secured for the determination of or action upon any of the questions upon which by any of the provisions hereof the majority in interest of said bondholders may have the right to decide may be called by the then trustees or in such other mode as may be from time to time fixed by such majority in interest of the holders of said bonds in respect to such meetings, and until said bondholders shall so act such powers may be exercised by the said trustees in this trust, and all acts or resolutions of the said bondholders affecting the rights or remedies, or for the benefit of the said bondholders, or the duties of the trustees, or the interest of the trust hereby created shall be authenticated by the signatures of all the persons assisting thereto, as well as by a record of the proceedings to be kept of any such meetings.

But it is understood and hereby expressly declared and agreed that no act or resolution of any meeting of bondholders or of the trustees, nor any act or election of or instrument executed by
187 a majority in interest of all said bonds, shall impair, control, or affect the rights, interests, or remedies, legal or equitable, of any non-assenting bondholder except in the particulars and to the extent to which the same is expressly made controlling by the provisions contained herein.

The said party of the first part does hereby covenant and agree to and with the said party of the second part and its successor or successors in this trust on behalf and for the benefit of the said bondholders intended to be secured hereby that it will from time to time and at all times hereafter, upon reasonable request, make, do, execute, acknowledge, and deliver all such *further acts, deeds, conveyances, and assurances* for the better assuring unto the said trus-

tees and their successor or successors in the trust hereby created, upon the trusts and for the purposes herein expressed or intended, all and singular the premises and lands herein conveyed or intended or covenanted so to be.

Said railway company, the said party of the first part, for itself and all other persons hereafter claiming through or under it and who may at any time hereafter become holders of liens junior to that of these presents, hereby *expressly waives and releases all right to have the assets* comprised in the security intended to be created by these presents *marshalled upon any foreclosure* or other enforcement thereof; and it is expressly hereby agreed and declared that the trustees herein and any court in which foreclosure of this
188 mortgage or administration of the trusts hereby created is sought shall have the right to sell the entire property of every description comprised in or subject to the trusts of these presents as a whole in one single lot if it shall in its discretion think fit, and a majority in interest of said bonds may by instrument in writing direct the trustees or petition the said court to sell the said property in such manner.

Said railway company, the said party of the first part, for itself, its successors and assigns, and so as to bind all persons who may claim through or under it as assigns, junior encumbrances, lienholders, or otherwise, doth hereby *irrevocably waive the benefit or advantage of any or all valuation, stay, appraisement, redemption, or extension laws* and of all laws requiring mortgages, liens, hypothecations, or other securities for money to be foreclosed by action therefor now existing or which may hereafter exist in any State wherein the property to be sold hereunder or any part thereof may at the time of sale be situated or where the said sale may take place which but for this provision herein might prevent or postpone the sale of said premises, property, rights, and interests to the purchaser under the powers and upon compliance with the provisions herein provided, and said party of the first part does hereby covenant with the *second* party of the second part, the said trus-
189 tees, or their successor or successors in the trust hereby created, that it will not in any manner *set up or seek or take the benefit or advantage of any such valuation, stay, appraisement, redemption, or extension law.*

And it is further mutually agreed by and between the parties hereto, and is hereby declared to be a condition upon which the said parties of the second part and their successor or successors in the trust hereby created have assented to these presents and accepted this trust, that the *said trustees and their successors in this trust shall not in any manner be held responsible for the acts or default of clerks, cashiers, or other persons employed by them unless guilty of culpable negligence* in the selection of such employees; nor shall the trustees be answerable except for their own willful defaults; nor shall one trustee be answerable for money received or acts done or committed by his co-trustee; nor shall either or any trustee be liable for the solvency of banks or trust companies selected for the deposit of moneys received under this trust, nor for errors of judgment, nor mistakes of

law or fact, or for anything short of his own gross negligence or willful misfeasance.

It is expressly agreed that the trustees may employ the necessary clerical, legal, and other assistance to enable them to execute this trust, and that the expense thereof and all other reasonable and necessary expenses and disbursements, as well as a reasonable commission or compensation to themselves, not exceeding, without
190 a special allowance by a court of competent jurisdiction, the maximum now allowed by the laws of the State of New York to executors, shall be paid or retained out of the proceeds of the sales of land or in the bonds secured hereby at their market value. Bonds and accrued interest received in payment of lands are for the purposes of estimating the commissions or compensation of the trustees, to be considered the same as if the payment had been made in money. The railway company shall pass upon and audit the accounts of the trustees.

And it is agreed and hereby provided that the *said trustees* and their successor or successors in this trust *may be removed and a successor may be appointed* at any time by any court of competent jurisdiction upon application of a majority in interest of the holders of the then outstanding bonds hereby secured.

And it is also agreed and hereby provided that *a majority in value of the outstanding bondholders secured hereby* may, upon their own motion, at any time, with or without cause, by an instrument or instruments in writing under seal, signed by them to that effect, and without calling a meeting of the bondholders for that purpose, *remove the said trustees* and any successor to the trust hereby created, and, in writing under seal, appoint one or more trustees herein, whether the last trustee shall have been appointed by a court of competent
191 jurisdiction or otherwise, anything herein to the contrary notwithstanding. In case of such removal and appointment of trustees by the bondholders the writing shall be signed by each bondholder or his or her agent, stating the place of residence of such holder and the serial numbers and the amounts of the bonds, and in every case the affidavit of the holder shall accompany the instruments of removal and appointment to the effect that the party signing such instruments is the owner or holder of the bonds for which he or she signs, and stating the serial number and the amount of each bond and the owner or holder's place of residence.

It is also hereby expressly agreed and provided that in case of the appointment, in any of the modes herein provided, of a successor or successors to the trust hereby created *such successor shall be, without any further act or conveyance being necessary, invested with all and singular the powers and duties hereby conferred and imposed upon the said trustees* herein and hereby designated so long as he or they shall remain such successor trustee.

No bonds shall be certified by the trustees hereunder except upon the receipt by them or their successors or survivor of a certified copy of a resolution of the party of the first part or of its successor stating how many acres of land have been certified or patented by the United States under said land grant to or for the benefit of the rail-

way company, and also stating that the title thereto has been
192 acquired by or has vested in said company and the number of bonds to which the said company is at the time entitled under this indenture, which said resolution thus certified shall be sufficient authority and full protection to the trustees to make the said certificate endorsed on the bonds and to certify and deliver bonds pursuant to such resolution, and no duty is imposed upon the trustees to look behind such resolution before certifying bonds and delivering same.

The said trustees each for himself hereby promises and agrees that in no *case will they deliver to said railway company* the said party of the first part, or any other person or persons *any of the bonds secured hereby except in conformity with the aforesaid provision of this instrument.*

The said trustees or any successor to this trust shall have the right, and they are hereby empowered and authorized, on any *sale under or foreclosure of* this mortgage or deed of trust, *to buy in the mortgaged property* at a price not exceeding the *mortgage bonds* secured hereby, and to hold and possess the property so purchased, and to control, manage, use, and operate the same and receive the incomes, rents, issues, and profits thereof upon the trusts and subject to the covenants and the conditions of this indenture.

And in case of any foreclosure sale or of any sale made under any of the provisions of this deed of trust *the purchaser or*
193 *purchasers thereat shall be entitled in making settlement for and payment of the purchase-money therefor to deliver to the then trustees toward the payment of such purchase-money any of the said bonds* secured hereby and held by such purchaser or purchasers, counting such bonds for such purpose at a sum not exceeding that which shall be payable out of the net proceeds of such sale to the holder or holders of such bonds as his or their share of payment, which may be required in cash for any indebtedness to this trust and for the costs and expenses of the sale, and which proportion of cash payment shall be determined and announced by the then trustees previous to any such sale; and if such proportionate sum shall be less than the amount of such bonds, to make such settlement by receipting thereon for the amount to be credited thereupon. For the purpose of carrying out the trusts and objects of these presents the said trustees or their successor or successors to this trust may, whenever it shall be deemed expedient, call *meetings of the holders of said bonds* secured hereby, in some convenient place in the city of New York, upon such notice and under such regulations as they may deem proper, but no decision of any majority in amount at any such meetings shall be of any effect unless the same shall be duly authenticated by an instrument in writing signed by the persons holding such majority and proved as herein provided. *The execution of any instrument or affidavit* required by any pro-
194 vision of these presents to be executed by a majority in amount of the holders of the said bonds hereby secured then outstanding shall be sufficiently proved in their respective execution of such instrument (which may be executed in any number of

parts or duplicates) and of any procuration or power of attorney under which any signer may claim to act and their holding of the said bonds respectively stated to be held by them. Such bonds being identified by their serial numbers and amounts as aforesaid shall be certified by a notary public or other person authorized to take acknowledgement of deeds, with their seals of office affixed, of any State or country, and any certificate and seal purporting to be a notarial certificate and seal or certificate and seal of any other officer authorized to take acknowledgements of any deeds shall be sufficient evidence of the official character of the persons making such certificates.

The words "trustee," said "trustee," and "party of the second part" as used in this instrument shall be construed to mean the trustee or trustees for the time being of this deed of trust, and, whenever a vacancy shall exist or any change of trustees shall be made, to mean the surviving or continuing or successor trustee; and any surviving, continuing, or successor trustee herein shall be possessed of and be fully competent to exercise all the powers and duties granted and conferred by these presents to the said trustees
195 named in this instrument as the party of the second part.

Any trustee may at any time *resign* his place as trustee by a proper instrument to that effect, which resignation shall be accepted by the party of the first part or its successor; whereupon the place of such resigning trustee shall become and be vacant.

In case of a vacancy by death, resignation, or otherwise at any time in the number of trustees the remaining trustee shall, while the vacancy exists, have all the rights and powers and shall discharge all the duties devolving on said trustees; but, as soon as it may conveniently be done, such vacancy shall be filled by the nomination by the remaining trustee of some proper person to fill such vacancy, which nomination shall be submitted to the board of directors of the said company, and, if approved by them, the person so nominated and approved shall immediately become a trustee under this instrument. If such nomination is not approved another person shall be nominated by said remaining trustee and, in like manner, submitted for approval, and so on until the nominations shall have been approved; but if three successive nominations shall be made and no one of them be approved by said board said vacancy shall be filled by a committee of three persons selected—one by the remaining trustee, one by the board of directors, and the third by the two thus selected; and the person selected trustee by the majority of the committee shall be trustee under this in-
196 strument. Notwithstanding these special provisions it shall be competent for a majority of the outstanding bondholders secured hereby to appoint a trustee or trustees to fill such vacancy or apply to a court of competent jurisdiction for such appointment.

It is expressly agreed that whereas the New Orleans Pacific Railway Company —, that the last-named company or its successor may, if the said two companies shall at any time so agree, take, for the purposes of this indenture, the place of the New Orleans Pacific Railway Company and perform all of the acts and things to be

performed hereunder by the New Orleans Pacific Railway Company as fully as if the Texas Pacific Railway Company or its successor had been expressly named in this indenture wherever the name of the New Orleans Railway Company or the words party of the first part occur therein. It is agreed that the officers of the land department of the railway company or of the Texas and Pacific Railway Company will act for the party of the first part in making contracts for the sale of land embraced herein at the appraised price, and that the trust hereby created shall only be charged by the railway company with the actual cash expenditures in respect of such lands, including the expense of procuring the same to be patented, the surveying, advertising, selling, and conveying
197 thereof, and including all necessary expenses of the land department pertaining thereto.

It is expressly agreed between the parties hereto and with the bondholders of the bonds secured hereby that the trustees may at all times apply to any circuit court of the United States having jurisdiction or to the supreme court of the State of New York for advice and direction as to the performance of their duties under or for the construction or interpretation of any provision of this indenture, and that process served upon the New Orleans Pacific Railway Company or the Texas Pacific Railway Company or its successor as aforesaid or the president, secretary, or any director of said company shall be all the service required to give such court full jurisdiction, and its orders and decrees shall be binding upon all the parties hereto and all bondholders secured hereby and fully protect the trustees for all acts done under or in pursuance of such orders and decrees.

It is expressly agreed that if on the 1st day of May in any given year during the continuance of this trust the moneys received from the sale of lands shall not be sufficient to pay the taxes and assessments on said lands due for the preceeding year or years and to pay the governmental charges and the actual cash expenses of the trust, then the said trustees are hereby authorized and empowered, in their discretion (anything in these presents to the contrary notwithstanding), to advertise for sale and sell at public auction, to the highest bidder, for cash, enough of said lands to raise the sum required
198 to pay the said taxes, assessments, and governmental charges and actual cash expenditures of the trust, and the conveyances by the trustees to the purchasers shall convey an absolute and irredeemable title to the lands thus sold.

Sales made under the foregoing power shall be made either in the city of New Orleans or New York, as the trustees may elect, and at such place therein as the trustees may select.

Notice of such sale and of the time and place thereof shall be given by the said trustees for four weeks in some newspaper of general circulation published in the city of New York and New Orleans. Such sales may be made whenever and as often as the contingency above specified shall happen.

If at any time the said trustees shall not have sufficient moneys in hand applicable to that purpose to pay the taxes, assessments,

and other governmental charges upon the lands hereby granted or intended to be, the said trustees may, and are hereby authorized and empowered, in their discretion, to sell and convey at *private* sale instead of public sale and at such price or prices as they may deem expedient, without regard to the appraised value thereof, so many of said lands as shall be necessary to produce the sum required to pay such taxes, assessments, and charges, and the deed of the said trustees shall convey a good title to the land so sold, free of the lien of this indenture. The purchasers are not in any case charged with the duty of seeing to any application of moneys by the trustees.

199 It is understood and agreed that this instrument is intended to have full operation and effect as a lawful mortgage of the above-described property in the State of Louisiana.

It is understood and declared that the trustees or their successors shall have full power to convey said lands according to the terms of this instrument, and their conveyance shall vest in the purchaser a full and absolute title without the joinder therein of the New Orleans Pacific Railway Company or the Texas and Pacific Railway Company.

In witness whereof the said party of the first part has hereunto affixed its corporate seal and has caused these presents to be attested by its president and secretary, at New Orleans, this 17th day of April, one thousand eight hundred and eighty-three.

By order of the board of directors.

(Sig.) E. B. WHEELOCK,
[SEAL.] *President.*

Attest:

(Sig.) WM. T. NICHOLSON,
Secretary.

Signed, sealed, and delivered in the presence of—

(Sig.) C. B. BANNER.
" T. J. KEANE.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Be it remembered that on the seventeenth day of April, A. D. one thousand eight hundred and eighty-three, before me, the undersigned, a notary public in and for the parish of Orleans, State
200 of Louisiana, duly commissioned and authorized to take acknowledgements and proof of the execution of deeds and other instruments of writing to be recorded or used in the State of Louisiana, as also to administer oaths, affirmations, etc., and to take and certify depositions, personally appeared the above-named Edward B. Wheelock, the president, and William S. Nicholson, the secretary, of the New Orleans Pacific Railway Company, and executed the above instrument of writing in my presence and that of the two witnesses whose names are thereto subscribed as such; and thereupon said Edward B. Wheelock, as president, and said William S. Nicholson, as secretary, of said New Orleans Pacific Railway Com-

pany, acknowledged that they had signed and executed the same as their act and deed for the consideration — uses there mentioned in their said respective capacities and as the act and deed of said New Orleans Pacific Railway Company.

And said Messrs. Wheelock and Nicholson, being by me first duly sworn, did, each for himself, depose and say that the said E. B. Wheelock is the president and said W. S. Nicholson is the secretary of the New Orleans Pacific Railway Company; that in said capacities they signed and executed the above instrument, by order of the board of directors, as and for the fact and deed of said New Orleans Pacific Railway Company; that the seal thereto affixed is the corporate seal of said company, and that it was affixed by order of the board of directors.

201 In testimony whereof I have hereunto set my hand and affixed the seal of office, as notary public aforesaid, at my office, in said city of New Orleans, on the day and date above written.

[Seal Samuel Flower, Notary Public, Parish of Orleans, Louisiana.]

(Sig.) SAM'L FLOWER,
Notary Public.

STATE OF LOUISIANA, }
Parish of Grant. }

I hereby certify that I have this 25th day of April, A. D. 1883, duly recorded the within & foregoing act in Book D of Mortgages, folios 472, '73, '74, '75, '76, '77, '78, '79, '80, '81, '82, '83, '84, '85, '86, '87, '88, '89, '90, & 491 of the records of this parish.

Given under my official signature and seal of office at Colfax, La.

(Sig.) S. B. SHACKELFORD,
Clerk 12th Jud. Dist. Court & ex Officio Notary Public.

(Endorsement:) No. 94. New Orleans Pacific Railway Company land-grant & sinking-fund mortgage to John F. Dillon and Henry M. Alexander. 1883. Grant. Exhibit "R 9." Offered in evidence on behalf of def't and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

202 EXHIBIT "R 10," RESPONDENTS'.

(Duplicate original.)

New Orleans Pacific Railway Company's supplemental land-grant and sinking-fund mortgage to John F. Dillon and Henry M. Alexander, trustees.

This indenture, made this fifth day of January, 1884, between the New Orleans Pacific Railway Company and John F. Dillon, of the city of New York, and Henry M. Alexander, of said city, parties of the second part, and hereinafter styled the trustees, witnesseth:

That—

Whereas the said railway company heretofore executed its land-grant and sinking-fund mortgage, dated the 17th day of April, 1883,

which has been duly recorded in the several counties or parishes in the State of Louisiana where the lands herein conveyed are situate, and which mortgage, hereinafter called the original mortgage, is hereby referred to and made part hereof as fully as if the same were incorporated herein at length;

And whereas the said New Orleans Pacific Railway Company has now fully completed its line of road from New Orleans via Baton Rouge and Alexandria to a connection with the Texas Pacific railway at Shreveport;

And whereas the President of the United States heretofore appointed Thomas Hazard a commissioner to examine the com-
203 pleted portions of the road of said railway company;

And whereas the said commissioner, by his report to the President of the United States, bearing date on or about the 26th day of October, 1881, reported that he had examined the following portion of the completed road of the said railway company, to wit, extending from the west bank of the Mississippi river, opposite Thalia street, New Orleans, Louisiana, in a northwesterly direction, near said river, sixty miles to near the town of Donaldsonville, in township 11 south, range 15 east; also from Bayou Lamourie, in township 2 north, range 2 west, a distance of twenty miles; also from the junction of said railway with the Texas and Pacific railway, in Shreveport, Louisiana, southwardly to township 10 north, range 12 west, a distance of fifty miles;

And whereas the said President afterwards appointed the said Thomas Hazard commissioner to examine other portions of the completed road of the said railway company, who made a second report to the President of the United States, bearing date on or about the fifteenth day of November, 1882, relating to such portions of the said railway as were not examined and reported on in his said first report of the 26th of October, 1881, amounting to one hundred and ninety-eight miles, lying between New Orleans and Shreveport;

And whereas the said commissioner reported to the President of the United States that said portions, three hundred and
204 twenty-eight miles in all, were constructed in substantial compliance with law and the instructions of the Department of the Interior;

And whereas the Secretary of the Interior reported to the President of the United States that in view of the facts stated in his said report he regarded the New Orleans Pacific Railway Company as the lawful assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company and entitled to the lands granted by the 22nd section of the act of Congress of March 3rd, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes," and to the patents therefor in so far as it has earned or may hereafter earn the same under the said act of Congress, with the exception next below herein named, and recommended therein to the President of the United States that he accept said three hundred and twenty-eight miles of the said road, less and exclusive of the sixty-eight

miles of the line of — said New Orleans, Baton Rouge and Vicksburg road extending from New Orleans to White Castle, between New Orleans and Shreveport, to which sixty-eight miles the New Orleans Pacific Railway Company has withdrawn its claim and right to receive lands under the 22nd section of said act of March 3d, 1871, and recommended to the President of the United States that patents for such lands as may have been earned by the
205 construction as aforesaid be issued to the New Orleans Pacific Railway Company, exclusive, nevertheless, of lands along said sixty-eight miles, on compliance by the said railway company with the law and regulations in such case made and provided, such patents to be subject to rights acquired by any person or corporation prior to said act of March 3d, 1871;

And whereas the President of the United States, on or about the sixteenth day of March, 1883, approved the said recommendations of the Secretary of the Interior and endorsed such approval on the said recommendations, all of which will appear more fully and at length by the records and files of the Interior Department; and—

Whereas, by virtue of the premises, the said New Orleans Pacific Railway Company's right to the said lands embraced in the land grant is now completed;

And whereas some considerable time may elapse before selections of lands can be completed and patents by the United States can be issued to the railway company for the said lands in regular course;

And whereas it is for the interest of the New Orleans Pacific Railway Company not to await the formal issue of patents before issuing the bonds provided in said original indenture of mortgage;

And whereas the said original indenture of mortgage provides, in several places therein, that no bonds are to be issued by the
206 company or certified by the trustees thereunder before the lands in the land grant are patented or certified by the United States to or for the benefit of or acquired by the said New Orleans Pacific Railway Company and only as fast as the lands are patented or certified to or the title thereto acquired by the said company;

And whereas no bonds have yet been issued, certified, or negotiated under the said original mortgage;

And whereas it is deemed expedient, for the reasons aforesaid, to change and modify the terms of the said original indenture of mortgage as herein provided so as to allow said bonds to be issued and certified at once upon the execution hereof, in advance of the issue of patents or certificates by the United States to the New Orleans Pacific Railway Company, the issue and certification of the said bonds to be at a rate of not exceeding two dollars and a half per acre for the quantity of lands which it is estimated the company will receive from the United States by reason of the completion of the said road:

Now, therefore, this ind-ure, made by way of supplement to the said original indenture, further witnesseth:

That the said original indenture of mortgage be, and is

hereby, modified so as to allow bonds to be issued from time to time and at any time after the execution of this indenture, on the resolution of the board of directors or executive committee of said New Orleans Pacific Railway Company,
207 to the full extent of the quantity of lands which it is estimated the said company will receive from the United States by reason of the completion of the said railroad, at the rate of not exceeding two dollars and a half per acre, in advance of the issue of patents or certificates by the United States to the New Orleans Pacific Railway Company; and the said trustees are hereby authorized, from time to time, any time after the execution hereof, to certify and deliver bonds hereunder to the New Orleans Pacific Railway Company, at the rate of not exceeding two dollars and a half per acre, to the extent aforesaid, upon the receipt by them or their successors or survivor of a certified copy of a resolution of the party of the first part stating the number of bonds, to a certification of which the company is at the time entitled under the provisions hereof, which resolution thus certified shall be sufficient authority and full protection to the trustees to make, from time to time, the certificate endorsed on said bonds and certify and deliver bonds to the said railway company on the receipt of its president or any other officer or agent authorized to receive the same on behalf of said railway company pursuant to such resolution, and no duty exists or is imposed on the trustees to look behind any such resolution before so certifying the bonds and delivering the same. The said trustees or the said railway company are authorized to stamp and endorse upon such of the said bonds as may be issued before the patenting of the lands the following:

208 "This bond is issued pursuant to an original mortgage referred to in the bond, dated the 17th day of April, 1883, and a supplemental mortgage, dated the — day of January, 1884, which supplemental mortgage recites that the New Orleans Pacific Railway Company has completed its road from New Orleans via Baton Rouge and Alexandria to a connection with the Texas Pacific railway at Shreveport, and that the same has been accepted by the President of the United States, and thereupon modifies the provisions of the original mortgage and of the within bond so as to authorize the said railway company to issue and the trustees to certify bonds as provided in the said mortgage and supplement, at the rate of not exceeding two dollars and a half an acre, for the number of acres of land which it is estimated the company will receive from the United States, in advance of the issue of patents or certificates by the United States."

And said trustees may also add to the form of the trustees' certificate on the said bonds as prescribed in the original mortgage words to show that the bonds are issued under the said mortgage as modified by this supplemental indenture, so as that the said certificate of the trustees will read as follows:

"It is hereby certified that this is one of the bonds secured by the said land-grant and sinking-fund mortgage, and that it is

issued in conformity with its provisions and those of said
209 supplemental mortgage.

"____ ____,
"____ ____,
"Trustees."

It is agreed by and between the parties hereto and each bondholder secured hereby that the officers of the land department of the New Orleans Pacific Railway Company, or by consent of that company and the trustees and the Texas Pacific Railway Company, that the officers of the land department of the said last-named railway company may act for the trustees in the sale of lands on the terms specified in that behalf in the original indenture of mortgage, and that the trustees shall not be personally liable for any acts or defaults of any of such officers; and it is also further agreed that notwithstanding the said the original mortgage and this indenture the said New Orleans Pacific Railway Company may carry out the written agreement of date January 4, 1882, between the said railway company and the Hon. E. W. Robertson and the Hon. N. C. Blanchard in behalf of settlers and occupiers on the lands within the limits of said land grant, but that the net proceeds of sales made to such settlers and occupiers shall be received by the trustees for the benefit of the trust created by the original mortgage and this supplement thereto, and on the receipt of such proceeds or on payment to them of the notes or obligations of such purchasers the trustees
210 may release the said lands from the lien of the said original and this supplemental mortgage.

And it is also further agreed by and between and on behalf of the parties aforesaid that the said railway company has the power and authority to settle and compromise any disputes which now exist or may at any time arise touching or concerning the title to any tract or tracts of land embraced within the said land grant, subject to the approval of said trustees, and the trustees may, on the receipt of the benefits of such settlement or compromise, release the lien of the original and of this supplemental mortgage as to such tract or tracts.

It is hereby declared that the said original indenture of mortgage is in full force and effect, except as herein modified, and that that instrument and this instrument and the said bonds and the indorsements thereon are to be taken and read as one instrument.

To carry out and effectuate the said original mortgage as modified by this supplement thereto this indenture further witnesseth:

That the said New Orleans Pacific Railway Company, in consideration of the premises and of one dollar to it in hand paid by the parties of the second part, receipt whereof is hereby acknowledged, in order to secure in the manner hereinbefore stated the payment in the manner provided of the sums of money mentioned in the said bonds and interest thereon issued or to be
211 issued, as in the said original mortgage and in this indenture set forth, has granted, bargained, sold, assigned, conveyed, and confirmed, and by these presents doth grant, bargain, sell, convey,

assign, and confirm, unto the said parties of the second part, as trustees, as joint tenants and not as tenants in common, and to their survivor or successor or successors and their heirs and assigns forever, all and singular the said several sections of land and each and every part thereof granted as aforesaid to the said New Orleans, Baton Rouge and Vicksburg Railroad Company by the said act of Congress approved March 3d, 1871, and also all the estate, right, title, interest, and claim whatsoever, at law or in equity, of, in, or to the same or any part or parcel thereof which the said New Orleans Pacific Railway Company now has, holds, owns, or is entitled to, or hereafter may or shall acquire, hold, own, or be or become entitled to, by force or virtue of the said act of Congress, saving, excepting, and reserving, however, from this indenture all parts and parcels of the said lands which are or shall be included in the railroad of the said New Orleans Pacific Railway Company or used for the construction or operation thereof or for the tracks, yards, depot grounds, not exceeding twenty acres at any one station, buildings, or erections thereof:

To have and to hold all and singular the premises hereby
212 granted or intended to be, with all the appurtenances thereunto belonging, unto the said parties of the second part as joint tenants and their successors and survivor and their and his heirs and assigns forever, as trustees, for the uses and purposes and upon the trusts and agreements in the said original mortgage and in this indenture set forth and declared and subject to the provisions and requirements of the aforementioned act of Congress.

It being well understood that each and all of said lands by this instrument and said original mortgage conveyed or intended to be conveyed are mortgaged, hypothecated, and affected in favor of said trustees and every holder of said bonds and any of them for the securing of each and every obligation created and evidenced by the said bonds, and that the said bonds secured hereby do not nor does this indenture or the said original indenture nor any statement or provision therein create any warranty or impose any liability *in personam* on the party of the first — or its successor or their stockholders and is no lien or charge on any property except the property mortgaged.

It is understood and agreed that the said trustees or their successors or the survivor have full power to convey the lands or any of them in this or the original mortgage conveyed to said trustees ac-
cording to the terms of said indentures, and their convey-
213 ance shall vest in the purchasers or grantees a full and absolute title (without warranty or personal liability or covenant on the part of the railway company or said trustees) to the said lands without joinder therein of either the New Orleans Pacific Railway Company or the Texas Pacific Railway Company, and for this purpose the estate and title in and to said lands aforesaid described are hereby granted, bargained, sold, and conveyed to said trustees by the said parties of the first part. The said trustees are also hereby vested with full power to do every act necessary or

proper in their best judgment to carry out and effectuate the purposes of the original and of this supplemental indenture.

Lands may be appraised and sold in the manner and for the purposes specified in the original mortgage in advance of the issue of patents by the United States. The lands herein mortgaged having been excepted by the New Orleans Pacific Railway Company from its conveyance to the Texas & Pacific Railway Company on the consolidation of said companies the trustees are to render account to and to deal with and consider the New Orleans Pacific railway as the mortgagor and holder and owner of the equity of redemption in respect of said lands until it otherwise provides by due corporate act or action duly notified to said trustees.

214 This indenture is executed in thirty duplicate originals for the purpose of facilitating the recording thereof, each of which is complete in itself, and all are to be taken as constituting but one instrument.

In witness whereof the said party of the first part has hereunto affixed its corporate seal and caused these presents to be attested by its president and secretary, at New Orleans, this fifth day of January, 1884.

Seal New Orleans Pacific Railway Company.

By order of the board of directors.

(Sig.) E. B. WHEELOCK, *President.*
(Sig.) WM. S. NICHOLSON, *Secretary.*

Signed, sealed, and delivered in presence of—
Attest: (Sig.) T. J. KEANE.
" J. Y. B. HASKELL.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Be it remembered that on the fifth day of January, A. D. one thousand eight hundred and eighty-four, before me, the undersigned, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and authorized to take the acknowledgment and proof of the execution of deeds and other instruments of writing to be recorded or used in the State of Louisiana, as also to ad-

215 minister oaths, affirmations, etc., and to take and certify depositions, personally appeared the above-named Edward B. Wheelock, the president, and W. S. Nicholson, the secretary, of the New Orleans Pacific Railway Company, and executed the above instrument of writing in my presence and that of the two witnesses whose names are thereto subscribed as such, and thereupon said Edward B. Wheelock, as president, and said W. S. Nicholson, as secretary, of said New Orleans Pacific Railway Company, acknowledged that they had signed and executed the same as their act and deed, for the consideration, uses, and purposes there mentioned, in their said respective capacities, and as the act and deed of said New Orleans Pacific Railway Company.

And said Messrs. Wheelock and Nicholson, being by me first duly sworn, did each for himself depose and say that the said E. B

Wheelock is the president and said W. S. Nicholson is the secretary of the New Orleans Pacific Railway Company; that in such capacities they signed and executed the above instrument by order of the board of directors as and for the act and deed of said New Orleans Pacific Railway Company; that the seal thereto affixed is the corporate seal of said company, and that it was affixed by order of the board of directors.

In testimony whereof I have hereunto set my hand and affixed my seal of office as notary public aforesaid, at my office,
216 in said city of New Orleans, on the day and date above written.

[Seal Samuel Flower, Notary Public, Parish of Orleans, Louisiana.]

(Sig.) SAM'L FLOWER,
Notary Public.

Attest: WM. S. NICHOLSON,
Secretary N. O. Pacific Ry. Co.

PARISH OF CATAHOULA, }
State of Louisiana. }

7th District Court.

CLERK'S OFFICE.

I hereby certify that the within mortgage has been duly recorded in Mortgage Book No. 6 of Catahoula parish, Louisiana, pages 66 to 76.

Witness my official signature and seal of office this 11th day of Febr'y, 1884.

[SEAL.] (Sig.) JOHN DOSHER,
Clerk, ex Officio Recorder, & Notary Public.

Endorsement: R. 10. New Orleans Pacific Railway Company. Supplemental land-grant and sinking-fund mortgage to John F. Dillon and Henry M. Alexander. 1884. Catahoula. Re-
217 & 218 corded Febr'y 9th, 1884, in Mortgage Book No. 6, pages 66 to 76, inclusive. (Sig.) W. G. Mobley, d'y clerk & *ex of.* recorder. No. 94. Exhibit R. 10. Offered in evidence on behalf of def't and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k. "F. W." No. 10060. U. S. circuit court, eastern district of Louisiana. Filed June 10th, 1885. (Sig.) E. R. Hunt, clerk.

219 *Replication.*

U. S. Circuit Court, 5th Circuit, Western District La. In Equity.

JOHN D. PARKER
vs.
THE N. O., B. — & V. R. R. Co. } No. 94.

The replication of John D. Parker, plaintiff, to the answer of the New Orleans Pacific Railway Co., John F. Dillon, & Henry M. Alexander, defendants.

This repliant, saving & reserving to himself all & all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver & prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters & things this repliant is & will be ready to aver & prove as this honorable court shall direct, and humbly prays as in & by his said bill he has already prayed.

(Sig.) JOHN D. PARKER,
By A. H. LEONARD, *Solicitor.*

Endorsement: No. 94. John D. Parker *vs.* N. O., B. R. & V. R. R. Co. Replication. Filed Dec. 1st, '86. E. J. Nolan, d'y cl'k.

220 *Cross-Bill of the N. O. P. R'y Co. & of Dillon & Alexander.*

U. S. Circuit Court, Western District of Louisiana.

JOHN D. PARKER
vs.
THE NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD COMPANY *et als.* } No. —.

To the judges of the circuit court of the United States for the fifth circuit and western district of Louisiana:

The New Orleans Pacific Railway Company, a corporation created by and under the laws of the State of Louisiana and having its domicil in the city of New Orleans, and John F. Dillon and Henry M. Alexander, of the city of New York, made defendants in the above-entitled cause, bring this their cross-bill herein against John D. Parker, the complainant in said cause, a citizen of the State of Illinois, and against the Union Trust Company of New York, a corporation created by and under the laws of New York; the New Orleans, Baton Rouge & Vicksburg Railroad Company, a corporation created by and under the laws of the State of Louisiana,

and against Samuel D. McEnery, a citizen of Louisiana residing at Baton Rouge, Louisiana, who is governor of Louisiana, the
221 said parties having been made defendants in said cause; and thereupon your orators in this cross-bill complain and say:

First. That heretofore and about February, 1886, said John D. Parker filed his bill of complaint in this honorable court in behalf of himself and all other persons holding bonds and coupons similar to those averred to be held by himself against the said The New Orleans, Baton Rouge and Vicksburg Railroad Company, the New Orleans Pacific Railway Company, the Union Trust Company of New York, Samuel D. McEnery and John F. Dillon and Henry M. Alexander, representing that said Parker was owner of two bonds, of $1,000 each, with 80 coupons to each attached for $40 each, each of said bonds bearing date Octo. 1st, 1870, and falling due Octo. 1st, 1910, and each of said coupons falling due on the 1st April and 1st October in each year up to maturity of bonds, representing that said bonds were of a series of 6,250 bonds of like date, tenor, and with like coupons, made by said New Orleans, Baton Rouge & Vicksburg Railroad Company, of which he avers that fifteen hundred have been issued and that five hundred are outstanding, and representing that said bonds are secured by a mortgage of October 1st, 1870, made by said New Orleans, Baton Rouge & Vicksburg Railroad Company, through Thomas C. Bates, its president (who is averred to have been duly authorized to make the same), before Thomas J. Beck, notary public in the parish of Orleans, and which two bonds and a certified copy of said mortgage are
222 averred to be filed as exhibits and part of his said bill of complaint; that in said mortgage the property claimed to be hypothecated and affected thereby is described as follows:

"The whole of the main line of railroad of the said company within the State of Louisiana, commencing at Ponchatoula, in the parish of Livingston, and extending thence to the city of Baton Rouge, in the parish of East Baton Rouge, forty-four miles, more or less; thence through the parishes of East Baton Rouge and East Feliciana to the State line of the State of Mississippi, forty-five miles, more or less; also a branch railroad commencing at the said city of Baton Rouge and extending thence through the parishes of West Baton Rouge, Iberville, Pointe Coupée, St. Landry, Avoyelles, Rapides, by way of Alexandria, Natchitoches, and De Soto, to Shreveport or some other point on the Southern Pacific railroad in the parish of Caddo, between Shreveport and the State line of the State of Texas, two hundred and thirty-six miles, more or less; also another branch railroad intersecting the branch railroad last described, and extending thence by way of the town of Washington to Opelousas, in the parish of St. Landry, sixteen miles, more or less; also another branch railroad commencing on the main line of said first-described railroad, in the parish of East Baton Rouge, and extending through the parishes of Ascension, St. Charles, & Jefferson to the Mississippi river
223 at the city of New Orleans, eighty-five miles, more or less; also another branch railroad commencing on the said

first-described main line at Ponchatoula, extending thence in a northeasterly direction through the parishes of Tangipahoa, St. Tammany, and Washington to the State line of Mississippi, to connect with the New Orleans and Meridian railroad, seventy-five miles, more or less—in all about five hundred and one miles of railroad—within the said State of Louisiana, together with the rights of way, road-bed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, tenders, and other rolling stock; also all personal and real estate within the State of Louisiana owned by the said company at the date of this mortgage or which may be acquired by it thereafter appurtenant to or necessary for the operation of said main line of said railroad or any of said branches connected with the said main line or to be connected therewith; also all other property, real & personal, of every kind and description whatsoever and wheresoever situated in the State of Louisiana which is now owned or which shall hereafter be acquired by the said company and which shall be appurtenant to or necessary or used for the operation of said main line of railroad or any of such branches; also the tenements, hereditaments, and appurtenances thereunto belonging, and all the estate, right, title, and interest, legal and equitable, of the said com-
224 pany and its successors and assigns therein, together with the corporate franchises and privileges of said company at any time granted or to be granted by the State of Louisiana relative to the construction, operation, and use of said railroad within said State.

. Said bill of said Parker further claims that said mortgage was duly recorded as set forth in said bill, and that thereafter the said New Orleans, Baton Rouge and Vicksburg R. R. Company could not transfer any property or rights mortgaged to the said mortgagor except subject thereto. He further sets forth a land grant made to said last-named company by the 22nd section of the act of Congress of March 3d, 1871. He sets forth the act of the legislature of Louisiana of 1872, No. 100, and claims that it conferred on said company the right to build a road from New Orleans to Shreveport. He claims that said act of Congress vested in said company the granted lands, and they became subject to the first mortgage above recited of October 1st, 1870. He represents that on or about the 11 November, 1871, the said company filed in the General Land Office of the United States a map of general route from Shreveport via Alexandria to Baton Rouge, and the lands were withdrawn by the department. He further avers that on about the 5th January, 1880, said company sold, transferred, and delivered to the New Orleans Pacific Railway Company all of its right, title, and interest in and to said lands aforesaid; that about March
225 3d, 1885, patents of the United States for 679,287.64 acres of said lands were issued to the New Orleans Pacific Railway Company; that on the 4th September, 1872, Calvin H. Allen, assuming to act as president of the N. O., Baton Rouge and Vicksburg Railway Company, executed a mortgage in favor of the Union Trust Company of New York on the same property to secure the payment of $12,000,000 first-mortgage seven per cent. land-grant

and sinking-fund gold bonds. It is averred by said bill that this is subordinate to the mortgage of October 1, 1870, and, moreover, that none of the bonds were ever issued, or, if put forth, are invalid.

Said Parker then avers that by acts of mortgage bearing date April 18, 1883, and January 5, 1884, the New Orleans Pacific Railway Company made in favor of John F. Dillon and Henry M. Alexander its land-grant and sinking-fund mortgage on the lands of the grant above described to secure bonds at the rate of two dollars and one-half per acre.

The complainant avers that this mortgage is subsequent and subordinate to the mortgage under which he claims, and he prays for a decree for the amount claimed to be due him, and declaring the lands subject to *the subject to* the said mortgage of October 1, 1870, and for a sale of these lands and for general relief, as by the said bill of complaint on file herein will appear.

226 Your orators in this cross-bill further show that they have appeared in this cause and filed a general demurrer, which has been overruled, and their answer has been filed on or about the 2d Octo., 1886, as by the pleadings and proceedings herein will specifically appear.

Second. Now your orators by this their cross-bill show that the New Orleans Pacific Railway Company was authorized by its said charter, being act 14 of 1876 of the General Assembly of Louisiana, to construct a railroad from the city of New Orleans through the State of Louisiana to a connection with the Texas Pacific railway at Shreveport; that prior to 1880 the New Orleans Pacific Railway Company had graded but a small part of its road, and the said New Orleans, Baton Rouge and Vicksburg Railroad Company had never graded or built any portion of its road, and was unable to do so. In 1880 the New Orleans Pacific Railway Company found it could raise means to construct its road provided it could acquire any existing right which the New Orleans, Baton Rouge & Vicksburg Company might have under the 22nd section of the said act of Congress of March 3, 1871; that by deed of January 5, 1881, in pursuance of contracts previously made therefor, the said New Orleans, Baton Rouge and Vicksburg Railroad Company conveyed to the New Orleans Pacific Railway Company all its right, title, and interest in and to said grant of public lands made by the said act of Congress

227 of March 3d, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes," as by the said deed referred to as part hereof will appear; which said conveyance was duly executed by said grantor company and accepted by said grantee company and was ratified by the stockholders of the said grantor. The Department of the Interior was notified of said grant and transfer. On the 21st February, 1881, the Commissioner of the General Land Office recognized the transfer *to* the New Orleans Pacific Railway Company proceeded with the construction of said road as required by the act of Congress, and on the 27th October, 1881, filed in the Department of the Interior a map of definite location of a part of

its road, and on the 17th November, 1882, duly filed with the same department a map of definite location of the rest of its road between New Orleans and Shreveport, and completed said road between New Orleans and Shreveport in all respects as required by acts of Congress. Commissioners were appointed by the Secretary of the Interior to examine the road so constructed by the New Orleans Pacific Railway Company, who reported that the same had been constructed in full compliance with the acts of Congress in that behalf, which reports were laid before the Secretary of the Interior, and on March 13, 1883, that officer found and decided that the New Orleans Pacific Railway Company had the right to receive the
228 lands under the 22nd section of said act, and that patents for such lands as had been earned by said N. O. Pacific Company should be issued to it. This finding and decision was laid before the President of the United States, who, on the 16th March, 1883, as authorized by and conformably to the said act of Congress of March 3d, 1871, endorsed the same: "The within recommendation approved. Chester A. Arthur." By reason of the construction of the said road by the New Orleans *Orleans* Pacific Railway Company, whereby it earned said lands, on or about the 3d March, 1885, patents of the United States for about 679,287.64 acres of lands were under the decision of the Secretary of the Interior and the President of the United States issued to the New Orleans Pacific Railway Company, being the same lands set forth in the bill of said Parker. The New Orleans, Baton Rouge, *Baton Rouge* and Vicksburg Railroad Company never at any time filed any map of definite location of its road or any part thereof. The maps filed as aforesaid by the New Orleans Pacific Railway Company on the 27th October, 1881, and the 17th November, 1882, were the first and only maps of definite location of said road ever filed with the Department of the Interior. The legal title to all the lands in place granted by said 22nd section of the act of March, 1871, remained in the United States at least until the said maps of definite location were filed, if not until said
229 patents were issued therefor on the 3d March, 1885, and as to the indemnity lands the title remained in the United States until they were actually selected, which selections were made by the New Orleans Pacific Railway Company in pursuance of its definite location and the construction of its road. The title to no part of said lands ever vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company, as alleged in the said bill of said Parker or otherwise; nor did the said last-named company ever acquire any equity by reason of construction of said road or otherwise to call on the United States to convey to it the title to said lands or any part thereof.

The title to said lands so patented and to all of them proceeded directly to the New Orleans Pacific Railway Company, and was held by it in its own right absolutely and not as trustee for the New Orleans — Baton Rouge Railroad Company or its mortgage bondholders or the complainant Parker or those he represents. The said lands upon which the bill of said Parker seeks to establish a lien for & on behalf of the said five hundred bonds alleged by him

to be outstanding under the alleged mortgage of October 1, 1870, were used by said New Orleans Pacific Railway Company to enable it to construct its said road, and were used and appropriated in part payment of the cost of constructing the same and by the issue of bonds secured by mortgage therein.

230 After the construction of said road and in order to obtain said patents the New Orleans Pacific Railway was obliged to and did pay large expenses for surveying, selecting, and conveying said lands & for taxes thereon, amounting to about forty thousand dollars.

By acts of mortgage dated April 18th, 1883, and January 5, 1884, your orator The New Orleans Pacific Railway Company made and executed in favor of your orators John F. Dillon and Henry M. Alexander, as trustees, a land-grant and sinking-fund mortgage of all the lands acquired by the New Orleans Pacific Railway Company from the United States by virtue of its construction of its said railroad (including the lands set forth in the said bill of the said Parker in this cause) to secure the payment of its land-grant and sinking-fund bonds, limited to an issue of $2.50 per acre, as will more fully appear by reference to said mortgage, which is referred to as & made part hereof, and is the same referred to by same dates in the bill of said Parker. This mortgage is the first and only lien on said lands, and is not in any way subsequent or subordinate to the mortgage alleged in said Parker's bill to have been made October 1, 1870, by the New Orleans, Baton Rouge & Vicksburg Railroad Company. The lands issued in pursuance of said mortgage of April 18, 1883, and January —, 1884, are outstanding in the

231 hands of bondholders for value, except so far as the same have been actually exchanged pursuant to the provisions of said acts of mortgage for lands so patented by the United States, March 3, 1885, to the New Orleans Pacific Railway Company.

Your orators show that pursuant to the provisions of the said mortgage made by the New Orleans Pacific Railway Company your orators are offering the said patented lands for sale under and pursuant to the trust, and are continually embarrassed in and prevented from selling the same and *to* from executing the duties of said trust and realizing the true value of said lands by reason of the claim set up by said Parker, complainant in this cause, that said mortgage of October 1st, 1870, alleged to have been made by the New Orleans, Baton Rouge & Vicksburg Railroad Company, is a patented lien on said patented lands, and the said claim of said Parker in behalf of himself and all other holders of the alleged $500,000 of bonds averred to be outstanding under and secured by said mortgage of October 1, 1870, is a cloud on the title of your orator as patentee and mortgagee, and inflicts continual and irreparable injury on them and each of them.

That as said mortgage of October 1st, 1870, and the said outstanding bonds secured thereby do not mature for many years your orators will continue to be embarrassed and injured thereby irreparably and for this long period of time.

232 That the complainant Parker sues on behalf of himself

and all other holders of bonds issued under said mortgage, and your orators are advised and believe that he represents upwards of two hundred of such bonds or some association of persons holding that number.

That each alleged holder of the five hundred bonds averred to be outstanding, other than said Parker, may bring suits similar to his against your orators, and thus involve them in a multiplicity of suits.

That a court of equity only can afford a remedy to your orators and remove and relieve against said cloud, and your orators have a right to file this their cross-bill to that end.

Third. Your orators in this cross-bill aver, as to said claim of said complainant Parker, that the said mortgage of Octo. 1st, 1870, is a lien on said lands patented to the New Orleans Pacific Railway Company, and that such lien is prior to that of the mortgage of said lands made by the New Orleans Pacific Railway Company to Dillon and Alexander, trustees.

(A.) The said New Orleans, Baton Rouge and Vicksburg Railroad Company, in October, 1870, had no power to mortgage by said instrument of October 1st, 1870, any land grant or lands granted thereby, made by act of Congress of March 3d, 1871.

233 (B.) The said New Orleans, Baton Rouge & Vicksburg Railroad Company never authorized the mortgaging by the instrument or act of October 1st, 1870, of any land grant or lands granted thereby and especially the land grant under said act of Congress of March 3d, 1871.

(C.) Said mortgage of October 1st, 1870, was never recorded and reinscribed in such a way as to preserve the lien claimed by said Parker, even if such lien there was, which is denied.

(D.) The said mortgage of October 1st, 1870, does not allude to, describe, include, cover, hypothecate, or affect the land grant made by said act of Congress of March 3d, 1871, or the lands granted thereby.

(E.) The New Orleans, Baton Rouge and Vicksburg Railroad Company never filed any map of definite location, never made any such definite location, and never built any road; and said lands were finally earned as aforesaid by the location and construction of a road by the New Orleans Pacific Railway Company.

(F.) In any event the coupons of the bonds which said Parker claims to hold, so far as they have matured, up to and including April 1, 1881, are extinguished by prescription of five years under the law of Louisiana.

(G.) The said compainant and his predecessors in title and the other holders for whom he sues have slept up- the alleged rights set up in his bill for fifteen years, and during the time the New Orleans Pacific Railway Company was acquiring said land grant and

234 making definite location of its road and building the same no holder of said bonds issued under the mortgage of 1870 nor the trustee of said mortgage made any claim of lien on the said land grant or the lands granted nor notified said New Orleans Pacific Railway Company nor said Dillon & Alexander of any said claim,

and said Parker and any other holders of said bonds and their trustee, the Union Trust Company of New York, have disentitled themselves to any relief in any event as against the New Orleans Pacific Railway Company and said Dillon and Alexander, the trustees in said mortgage- of 1883 and 1884.

Fourth. That the patented lands concerning which this controversy is pending as aforesaid are situated in the western district of Louisiana, but that none of the parties to this suit or cross-bill are inhabitants of or found within said district, but the said complainant is represented in this cause by his solicitors of record, and your orators in this cross-bill are entitled to have the parties made defendants thereto compelled to answer by service, by publication, by service on counsel of record, and in such manner as your honors may direct.

To the end, therefore, that your orators may have such relief as can be afforded only by a court of equity and that a decree may be made in this cause that the mortgage executed on behalf of the New Orleans, Baton Rouge and Vicksburg Railroad Company by
235 Thomas C. Bates appearing, as its president, before Thomas Jefferson Beck, a notary public in and for the parish of Orleans, at the city of New Orleans, October 1st, 1870, of which a copy is averred by the original complainant herein to be filed as a part of his bill of complaint, does not embrace, cover, include, hypothecate, or affect the lands patented March 3d, 1885, by the United States to the New Orleans Pacific Railway Company under the said act of March 3d, 1871, or any part thereof, and creates no lien thereon or right in, on, or to the same or any part thereof in favor of the Union Trust Company of New York, as trustee, or any holder of any bond secured by said instrument, and that such other or further relief & decree for costs may be granted as may be just may it please your honors to grant to your orators in this cross-bill writs of subpœna, under the seal of court, to be directed to John D. Parker, Samuel D. McEnery, the Union Trust Company of New York, and the New Orleans, Baton Rouge & Vicksburg Railroad Company, commanding them and each of them at a certain time and under a certain penalty, therein to be limited, personally to appear before this court and then and there full, true, direct, and perfect answer make, but not upon oath or affirmation, to all and singular the premises; and, further, to stand to, perform, and abide such further directions and decree therein as your honors shall deem meet; and in case said parties defendant or any of them are not found in said western district, may it please your honors
236 to make an order herein directing such defendants to appear, plead, answer, or demur hereto by a day certain to be fixed, and may it please your honors to direct that service be made on said defendants in such manner, by publication and otherwise, as to your honors may seem proper; and your orators will ever pray, &c.

(Sig.) DILLON & SWAYNE,
" KENNARD, HOWE & PRENTISS,
Sol's for said Complainants in Cross-Bill.

(Sig.) W. W. HOWE, *Of Counsel.*

Let this cross-bill be filed.
Oct. 7th, 1886.
(Sig.) ALECK BOARMAN, *Judge.*

Service of subpœna waived.
Oct. 19th, 1886.
(Sig.) A. H. LEONARD,
Solicitor for J. D. Parker.

Endorsement: U. S. circuit court, W. D. of Louisiana. No. 94. John D. Parker *vs.* The N. O., B. R. & — R. R. Co. Cross-bill of the N. O. P. R'y Co. & of Dillon & Alexander. Filed Oct. 13, '86. E. J. Nolan, d'y cl'k.

237 *Order to Plead.*

U. S. Circuit Court, Western District of Louisiana.

JOHN D. PARKER
vs.
THE NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD COMPANY *et als.* } No. 94.

On motion of Kennard, Howe & Prentiss and Dillon & Swayne, solicitors for the New Orleans Pacific Railway Company and for John F. Dillon and Henry M. Alexander, trustees, defendants in this suit and complainants in the cross-bill which has been filed herein, and on showing to the court that this is a suit commenced in this court, on the equity side, to enforce an alleged lien on real property within the said western district of Louisiana, and that said cross-bill has been filed by the movers to remove a cloud upon the same real property, and that The New Orleans, Baton Rouge and Vicksburg Railroad Company, The Union Trust Company of New York, and Samuel D. McEnery, who is governor of Louisiana, are made defendants in said cross-bill, and are not nor is either of them an inhabitant of or found within the said western district of Louisiana—

It is ordered by the court that said absent defendants in said cross-bill, to wit, The New Orleans, Baton Rouge and Vicksburg Railroad Company, The Union Trust Company of New York, and Samuel D. McEnery (who is governor of Louisiana), do ap-
238 pear, plead, answer, or demur to the said cross-bill of the movers on or before the 20th day of December, 1886, and that this order be served on said defendants to said cross-bill, if practicable, and be published in the Shreveport Journal once a week for six consecutive weeks.

This done and signed Oct. 27, 1886.
(Sig.) ALECK BOARMAN, *Judge.*

Endorsement: No. 94. U. S. circuit court, W. D. of La. John D. Parker *vs.* The N. O., B. R. & V. R. R. Co. *et als.* Order to plead or —. Filed Oct. 28, '86. (Sig.) J. W. Wheaton, cl'k.

239 *Order to Plead, as Published in Shreveport Journal, and Affidavit of Service.*

Citation.

United States Circuit Court, Western District of Louisiana.

JOHN D. PARKER
vs.
THE NEW ORLEANS, BATON ROUGE AND VICKSBURG RAILROAD COMPANY *et als.* } No. 94.

On motion of Kennard, Howe & Prentiss and Dillon & Swayne, solicitors for the New Orleans Pacific Railway Company and for John F. Dillon and Henry M. Alexander, trustees, defendants in this suit and complainants in the cross-bill which has been filed herein, and on showing to the court that this is a suit commenced in this court on the equity side to enforce an alleged lien on real property within the said western district of Louisiana, and that said cross-bill has been filed by the movers to remove a cloud upon the same real property, and that The New Orleans, Baton Rouge and Vicksburg Railroad Company, The Union Trust Company of New York, and Samuel D. McEnery (who is governor of Louisiana) are made defendants in said cross-bill, and are not nor is either of them an inhabitant of or found within the said western district of Louisiana—

It is ordered by the court that said absent defendants in said cross-bill, to wit, The New Orleans, Baton Rouge and Vicksburg Railroad Company, The Union Trust Company of New York, and Samuel D. McEnery (who is governor of Louisiana), do appear, plead, answer, or demur to said cross-bill of the movers on or before the 20th day of December, 1886, and that this order be served on said defendants to said cross-bill, if practicable, and be published in the Shreveport Journal once a week for six consecutive weeks.

This done and signed October 27th, 1886.

(Sig.) ALECK BOARMAN, *Judge.*

240 —— ——, *ss:*

J. E. Blouin, being duly sworn, says that on the 5th day of November, 1886, at his office, in the city of Baton Rouge, he served a copy of the above order on Hon. Samuel D. McEnery, who is governor of Louisiana, by delivering said copy to said McEnery in person and leaving the same with him.

(Sig.) J. E. BLOUIN,
Dep'ty Sh'ff.

Sworn before me this the 5th day of November, A. D. 1886.

[Seal George W. Buckner, Notary Public, Baton Rouge, La.]

(Sig.) GEO. W. BUCKNER,
Notary Public.

Sh'ff fees	50
Notary "	1 00
	1 50

Endorsement: U. S. circuit court, W. D. of La. No. 94. John D. Parker *vs.* The N. O., B. R. & V. R. R. Co. *et als.* Order to plead, as published in Shreveport Journal, and affidavit of service. Filed Nov. 10, '86. E. J. Nolan, d'y cl'k.

241 *Demurrer to Cross-Bill.*

U. S. Circuit Court, Western District Louisiana.

JOHN D. PARKER
vs.
THE N. O., B. R. & V. R. R. Co. } No. 94. In Equity.

The demurrer of John D. Parker, plaintiff, to the cross-bill of complaint herein filed of the New Orleans Pacific Railway Co., John F. Dillon, & Henry M. Alexander.

Said John D. Parker, by protestation, not confessing all or any of the matters & things in the cross-bill of complaint aforesaid contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said cross-bill, and for cause of demurrer showeth that said railroad company, Dillon, & Alexander have not in & by said cross-bill made or stated such a case as entitles them in a court of equity to any discovery from this plaintiff or to any relief against him as to the matters contained in the said cross-bill or any of such matters.

Wherefore & for divers other causes of demurrer appearing in the said cross-bill the plaintiff doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said cross-bill, & prays to be hence dismissed with his costs & charges in this behalf most wrongfully sustained.

(Sig.) JOHN D. PARKER,
By A. H. LEONARD, *Solicitor.*

Personally appeared before me, the undersigned authority, A. H. Leonard, who, being duly sworn, deposes & says that he is
242 solicitor for John D. Parker, who is absent from the fifth circuit of the United States, & that the within demurrer is not interposed for delay.

(Sig.) A. H. LEONARD.

Sworn to & subscribed before me this 22nd day of November, A. D. 1886.

(Sig.) ALECK BOARMAN, *Judge.*

I certify that in my opinion the within demurrer is well founded in law.

(Sig.) A. H. LEONARD, *Solicitor.*

Endorsement: No. 94. John D. Parker *vs.* N. O., B. R. & V. R. R. Co. *et al.* Demurrer to cross-bill. Filed Nov. 22d, 1886. (Sig.) Aleck Boarman, judge.

Motion to Set Down Demurrer to Cross-Bill.

U. S. Circuit Court, W. D. of La.

JOHN D. PARKER
vs.
NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD COMPANY *et al.* } No. 94.

243 And now come the cross-complainants in this cause and set down for argument the demurrer to their cross-bill filed herein by John D. Parker, the original complainant in this cause, and ask that the same be fixed for a day, according to the rules.

(Sig.) KENNARD, HOWE & PRENTISS,
" DILLON & SWAYNE,
Soli's for Cross-Complainants.

(Endorsement:) U. S. circuit court, W. D. of La. No. 94. John D. Parker *vs.* N. O., B. R. & V. R. R. Co. Mo. to set down demurrer to cross-bill. Filed Dec. 7th, '86. E. J. Nolan, d'y cl'k.

Petition to Join Complainant in Suit.

U. S. Circuit Court, Western District of Louisiana. In Equity.

JOHN D. PARKER
vs.
NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD COMPANY. } No. 94.

244 To the hon. the judges of the circuit court of the United States for the western district of Louisiana:

The petition of Walter A. Hamlin, a citizen of the State of New York, residing in New York city, respectfully represents that he is the owner and holder of five bonds known as first-mortgage construction bonds, each for one thousand dollars, or £200 gold coin, bearing date A. D. 1870, payable on the 1st day of October, A. D. 1910, to the Union Trust Company of New York or bearer, with eighty coupons attached to each and every bond, each for forty dollars, payable to bearer, for semi-annual interest on said bonds; that no part of the principal or interest on said bonds and coupons has been paid; that the interests of your petitioner are identical with the complainant's, John D. Parker, his bonds and coupons belonging to the same class and being of like character and the same series as those set forth in complainant's bill of complaint; that your petitioner's bonds are numbered from one to five, inclusive.

Your petitioner attaches his bonds hereto and refers to them as a

part of this petition, and will produce them on the trial of this cause. Your petitioner adopts the allegations of the bill of complaint heretofore filed by complainant John D. Parker, and avers his willingness to contribute to the expenses and costs of this suit and join the complainant in maintaining the same.

245 Wherefore petitioner prays that leave be granted him to file this petition, and that he be joined as co-complainant with said John D. Parker in said proceedings, and that the claim of your petitioner be recognized and established by due proceedings and the relief prayed for in the bill of complaint heretofore filed be accorded to him as if specially prayed for herein, and for general relief as to the court may seem proper in the premises.

(Sig.) A. GOLDTHWAITE,
Sol. for W. A. Hamlin, Petitioner.

Order.

Let this petition be filed, and let the petitioner, Walter A. Hamlin, be admitted to the suit pending as a coplaintiff in the proceedings as prayed for.

(Sig.) DON A. PARDEE, *Judge.*

Dec. 24th, 1886.

Endorsed: No. 94. U. S. circuit court, western dist. of La. In equity. John D. Parker *vs.* New Orleans, Baton Rouge & Vicksburg R. R. Co. & others. Petition to join complainant in suit. Filed Dec. 27th, '86. E. J. Nolan, d'y cl'k.

246 *Stipulation.*

U. S. Circuit Court, W. D. of Louisiana.

JOHN D. PARKER
vs.
THE N. O., BATON ROUGE & — R. R. Co. *et als.* } No. 94.

W. A. Hamlin having been made a complainant herein, it is agreed that the cause shall stand and be considered as if he had been one of the complainants in the original bill, and that the pleadings of complainant Parker shall be considered as Hamlin's also, and the pleadings of the defendants The New Orleans Pacific Railway Company and of Messrs. Dillon & Alexander shall apply equally to said Hamlin. The said defendants have leave to and hereby withdraw from their answer and cross-bill all exception, plea, and defense of prescription of five years and allegations respecting the same.

(Sig.) ALFRED GOLDTHWAITE,
Sol. for W. A. Hamlin, Coplaintiff.

(Sig.) KENNARD, HOWE & PRENTISS,
For said Defendants.

23d March, 1887.

Endorsement: No. 94. U. S. circuit court, W. D. of La. John D. Parker *vs.* The N. O., B. R. & V. R. R. Co. Stipulation. Filed April 5th, '87. E. J. Nolan, d'y cl'k.

247 *Withdrawal of Plea of Prescription.*

U. S. Circuit Court, W. D. of Louisiana.

JOHN D. PARKER
vs.
THE NEW ORLEANS, B. R. & V. R. R. Co. *et als.* } No. 94.

And now come The New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, defendants herein, and withdraw the exception, plea, or defense of prescription of five years set up by them in their answers herein or otherwise and all allegations respecting same, and move the court for leave to modify their answers by striking therefrom the said defense of prescription.

(Sig.) KENNARD, HOWE & PRENTISS,
Solicitors for N. O. P. R'y Co. & John F. Dillon & H. M. Alexander.

Let this withdrawal be filed and motion granted.

(Sig.) ALECK BOARMAN, *Judge.*

April 1st, 1887.

Endorsement: No. 94. U. S. circuit court, W. D. of La. Parker *vs.* N. O., B. R. & V. R. R. Co. Withdrawal of plea of prescription. Filed April 5th, '87. E. J. Nolan, d'y cl'k.

248 *Stipulation as to Hamlin's Bonds.*

U. S. Cir. Court.

JOHN D. PARKER
vs.
N. O., B. R. & V. R. R. Co. *et als.* } No. 94.

Upon note of evidence of W. A. Hamlin, coplaintiff, it is consented by defendants that the five bonds, with coupons, held by co-complainant Hamlin & by him offered in evidence, being of the same issue as those held by plaintiff, need not be filed in this suit nor copied in any transcript of appeal, but that those offered by plaintiff may stand as samples of the entire lot of seven bonds and coupons.

(Sig.) HOWE & PRENTISS,
For Respondents.

Endorsement: No. 94. U. S. C. C., western dist. La. Stipulation as to Hamlin's bonds. Filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

249 *Supplemental Answer.*

U. S. Circuit Court, W. D. of Louisiana.

JOHN D. PARKER
vs.
N. O., BATON ROUGE & VICKSBURG R. R. COMPANY. } No. 94.

The supplemental answer of The New Orleans Pacific Railway Company and of John F. Dillon and Henry M. Alexander, trustees, respondents herein, respectfully shows—

That since their answer was filed herein the act of Congress of the United States has been adopted and approved February 8th, 1887, whereof a copy is hereto annexed, marked "Respondents' Exhibit No. 8," and the same has been accepted by the New Orleans Pacific Railway Company through the action of a majority of its stockholders; and said company has accepted and agreed to discharge all the duties and obligations imposed on the New Orleans, Baton Rouge & Vicksburg Railroad Company by the said act of March 3d, 1871, and the Secretary of the Interior has been satisfied of the same and has issued his orders therein, also hereto annexed, marked "S 1."

And respondent reiterate the prayer of their original answer and pray for all general relief.

(Sig.) HOWE & PRENTISS,
Sol's for Respondents.

250 I have no objection to the filing of this supplemental answer and consent to the same.
June 15th, 1887.
(Sig.) A. GOLDTHWAITE,
Sol. for Co-complainant W. A. Hamlin.

Have no objection to filing of this supplemental answer.
June 16th, 1887.
(Sig.) LEONARD, MARKS & BRUENN,
For Compl'nt.

Let supplemental answer be filed.
June 17, 1887.
(Sig.) ALECK BOARMAN, *Judge.*

EXHIBIT No. 8, RESPONDENTS'.

(Public, No. 44.)

An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes.

Be it enacted by the Senate and House of —— the United States of America in Congress assembled, That the lands granted to the

New Orleans, Baton Rouge and Vicksburg Railroad Company by the act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, are hereby declared to be forfeited to the United States of America in all that part of said grant which is situate on the
251 east side of the Mississippi river and also in all that part of said grant on the west of the Mississippi river which is opposite to and coterminous with the part of the New Orleans Pacific Railroad Company which was completed on the fifth day of January, eighteen hundred and eighty-one, and said lands are restored to the public domain of the United States.

SEC. 2. That the title of the United States and of the original grantee to the lands granted by said act of Congress of March third, eighteen hundred and seventy-one, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed, and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October twenty-seventh, eighteen hundred and eighty-two, which indicate the definite location of said road: *Provided*, That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their assigns or heirs shall be held and deemed excepted from said grant, and shall be subject to entry under the public-land laws of the United States.

SECTION 3. That the relinquishment of the lands and the
252 confirmation of the grant provided for in the second sections of this act are made and shall take effect whenever the Secretary of the Interior is notified that said New Orleans Pacific Railroad Company, through the action of a majority of its stockholders, has accepted the provisions of this act and is satisfied that said company has accepted and agreed to discharge all the duties and obligations imposed upon the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of March third, eighteen hundred and seventy-one, entitled *an* "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

SEC. 4. That it shall be the duty of the Secretary of the Interior, in issuing patents for the lands conveyed herein, to establish such rules and regulations as to enable all persons who on the first day of December, eighteen hundred and eighty-four, were in the actual occupancy of any of the lands to which the New Orleans Pacific Railroad Company is entitled under the provisions of this act and who are of the description of persons entitled — make homestead or pre-emption entry on public lands under the general laws of the United States to secure titles to the lands so held by them, not to exceed in quantity one quarter section and not less than one-six-

teenth of a section, on the payment to said company, in law-
253 ful money of the United States, at the rate of two dollars per acre, for the lands so occupied, at one-third cash and balance in such equal annual installments as the Secretary of the Interior shall by regulations prescribe, it being the intention of this section to protect the settlers upon said lands and to give binding force and effect to the Blanchard-Robinson agreement made with the New Orleans Pacific Company on the fourth day of January, eighteen hundred and eighty-two, and filed in the office of the Secretary of the Interior.

SEC. 5. That the Secretary of the Interior shall make all needful rules and regulations for carrying this act into effect, and shall have the authority to direct, if he think proper, and shall so declare in such regulations, that payments may be made for the lands held and occupied under the fourth section of this act in not exceeding four equal annual installments from the date of sale, with interest thereon not to exceed six per centum per annum.

SEC. 6. That the patents for the lands conveyed herein that have already been issued to said company be, and the same are hereby, confirmed; but the Secretary of the Interior is hereby fully authorized and instructed to apply the provisions of the second, third, fourth, and fifth sections of this act to any of said lands that have been so patented and to protect any and all settlers on said lands in all their rights under the said sections of this act.

254 Approved February 8, 1887.

Offered by d'f't- on hearing.

Respondents' Exhibit No. 8. Offered in evidence and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

"EXHIBIT S 1" & "H."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 6, 1887.

Register and receiver, New Orleans, La.

GENTLEMEN: I have to call your attention to the act of Congress approved Feb. 8, 1887 (copy herewith), entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes." The first section of the act declared a forfeiture of and restored to the public domain all lands lying east of the Mississippi which were granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by act of March 3, 1871, and also all those on the west side of the river lying opposite and lying coterminous with that part of the road which was completed on the 5th of January, 1881, or that portion between New Orleans and Whitecastle.

The second section confirms to the New Orleans Pacific Railroad Company the titles to the lands granted by said act of March

3, 1871, and not declared forfeited by the first section, but
255 provides that all of the lands that were occupied by actual settlers at the date of the definite location of the road and were still in their possession or in the possession of their heirs or assigns should be held and deemed excepted from the grant and subject to entry under the laws of the United States. This provision applies to the patented as well as to the unpatented lands.

The duties of the definite locations as determined by the honorable Secretary of the Interior are, Oct. 17, 1881, for the portions of the road from a point in township 2 north, range 1 east, to a point in township No. 4 north, range 2 west, and from Shreveport to a point in township 10 north, range 12 west, and, Nov. 7, 1882, for the balance of the roads.

The twenty-mile lateral limits of the grants and the terminal limits of each of the sections as definitely located and constructed are shown by yellow shading upon the diagram furnished you with office letter of Oct. 15, 1883.

When claimants under this section present proper applications to enter you will notify the company thereof and allow thirty days within which to file objections. If no objection is made within the time allowed you will allow the entry, and in making your returns thereof you will transmit with the entry papers the documents showing the previous action taken.

256 If the company should object you will order a hearing in the usual manner, and upon the conclusion of the trial transmit the testimony to this office, accompanied by your joint opinion thereon.

The third section provides that the confirmation of the grant made by the second section should take effect when the company should accept the provisions of this act in the manner prescribed and agree to discharge all the duties and obligations imposed by the act of March 3, 1881.

The acceptance and agreement on part of the company were filed with the Secretary of the Interior April 20, 1887, and the relinquishment and confirmation of the grant provided for in the second section of the act went into effect that day.

The fourth section directs the Secretary of the Interior to establish such rules and regulations in issuing patents for the lands confirmed to the company by this act as will enable persons who were in actual occupancy of any portion thereof on Dec. 1, 1884, and who are qualified pre-emption or homestead claimants to secure titles to the land held by them, not to exceed one section in quantity and not less than one-sixteenth of a section, on payment to the company at the rate of $2 per acre for the land occupied, one-third to be paid in cash and the balance in such equal annual installments as the Secretary of the Interior shall prescribe.

257 The fifth section directs the Secretary of the Interior to make all needful rules and regulations for carrying this into effect, and authorizes him to direct that payments for lands purchased under the fourth section may be made in any number of annual installments, not exceeding four from the date of the sale,

with interest thereon not to exceed 6 per cent. per annum. Upon the receipt of any proper application under the fourth section of the act you will notify the company thereof and allow thirty days within which to file objections. If no objection is made the applicant will be held and deemed to have a valid claim and right of purchase in the land applied for, and you will so notify the company. Should the company object you will order a hearing and proceed as directed in section 2.

The sixth section of the act authorizes and instructs the Secretary of the Interior to apply the provisions of the second, third, fourth, and fifth sections to any lands that have been patented under the railroad grant of March 3, 1871, and to protect any and all settlers on said lands in all said rights under said section.

In all cases under section 2, where the rights of entry under the laws of the United States shall have been fully established to lands which have been patented to the company, the latter will be required to reconvey such lands to the United States, to the
258 end that no cloud may rest upon the title of the entryman.

In cases where the right of purchase under the fourth section of the act shall be established the railroad company will be required to convey the land to the applicants upon the receipt of the first payments and secure itself for the deferred payments by liens upon the land sold or to enter into such contracts to convey the lands upon the receipt of the final installment paid in the manner below described as usual will be satisfactory to this office.

The fourth section prescribes that purchasers thereunder shall pay one-third of the purchase-money in cash under the authority given the Secretary of the Interior. The balance of the purchase-money shall be paid in four equal installments from the date of the sale, and interest on the deferred payments shall be at the rate of 6 per cent. per annum. Purchasers coming within the provisions of this section may at any time make payment of the whole or any equal annual installment of the purchase-money.

Application to enter under the second section and to purchase under the fourth should be accompanied by the corroborated affidavit of the claimant, setting forth the facts respecting his settlement and residence upon and cultivation of the land claimed.

259 Very respectfully,

(Sig.) WM. A. J. SPARKS,
Commissioner.

Exhibit "S 1." (Offered by def't on hearing.) Offered in evidence on behalf of def'ts and filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

Endorsement: No. 94. U. S. cir. court, W. D. of La. John D. Parker *vs.* N. O., B. R. & V. R. R. Co. *et als.* Suppl. answer. Filed July 18th, '87. E. J. Nolan, d'y cl'k. Exhibits "H" & "S 1."

(Here follow 2 maps marked p. 259*a* & 259*b*.)

Agreement to Submit.

U. S. Circuit C't, Western Dist. of La. In Equity.

J. D. PARKER & Others
vs.
260 THE NEW ORLEANS, BATON ROUGE AND VICKSBURG R. R. Co. & Others. } No. —.

I consent to submit this cause upon the argument of solicitors for complainant J. D. Parker, and respectfully ask leave of the court to file a brief within the delay of two weeks from submission of the cause.

(Sig.) ALFRED GOLDTHWAITE,
Sol'r for W. A. Hamlin, Coplaintiff.

N. O., Oct. 24th, 1887.

Endorsement: No. 94. U. S. circuit court, western dist. of La. In equity. J. D. Parker & others *vs.* The N. O., Baton Rouge & Vicksburg R. R. Co. & others. Agreement to submit. Filed Oct. 26th, 1887. (Sig.) J. B. Beattie, d'y cl'k.

261 *Petition to Make Party.*

U. S. Circuit Court, Western District of Louisiana. In Equity.

JOHN D. PARKER *et al.*
vs.
THE NEW ORLEANS, BATON ROUGE AND VICKSBURG RAILROAD COMPANY *et als.* } No. 94.

To the hon. the judges of the court:

The petition of Frederick V. Hamlin, administrator of Walter A. Hamlin, respectfully shows that Walter A. Hamlin has departed this life, and that petitioner has been duly appointed administrator of his estate. He therefore prays that he may be made a party to this cause as co-complainant, and that the cause so proceed, and for all general relief.

(Sig.) ALFRED GOLDTHWAITE,
Solicitor for Frederick V. Hamlin, Administrator.

Order.

Let the prayer of the foregoing petition be granted, and let the petitioner, Frederick V. Hamlin, as administrator of the estate of Walter A. Hamlin, be made co-complainant herein.

(Sig.) DON A. PARDEE,
Circuit Judge.

March 29th, 1888.

We have no objection to foregoing order.

(Sig.) HOWE & PRENTISS,
Sols. for Respondents in Above Cause.

March 28th, 1888.

262 Endorsement: No. 94. U. S. circuit c't, western dist. of Louisiana. Jno. D. Parker *et al. vs.* The New Orleans, Baton Rouge & Vicksburg R. R. Co. Petition to make party. Filed April 2nd, '88. E. J. Nolan, d'y cl'k.

263 *Minutes of Court.*

WEDNESDAY, *August 4th*, 1886.

Court met pursuant to adjournment.

JOHN D. PARKER
vs.
N. O., B. R. & V. R. R. Co. } No. 94. Demurrer Overruled.

On motion of A. H. Leonard, Esq., solicitor for plaintiff, and on suggesting to the court *and* due proof thereof that notice has been given all defendants by publication, in accordance with previous orders of this court, and on further suggestion that several defendants, viz., The New Orleans, Baton Rouge & Vicksburg Railroad Company, The Union Trust Company of New York, and S. D. McEnery, governor of Louisiana, have made no appearance, it is ordered that as against said defendants there be judgment *pro confesso*.

Aug. 4th, 1886.

(Sig.) ALECK BOARMAN, *Judge*.

MONDAY, *March 28th*, 1887.

Court met pursuant to adjournment.

J. D. PARKER
vs.
N. O., B. R. & V. R. R. Co. *et al.* } No. 94.

Ordered by the court that the demurrer be sustained, and that the cross-bill be dismissed.

MONDAY, *July 18th*, 1887.

264 Court met pursuant to adjournment.

J. D. PARKER
vs.
N. O., B. R. & V. R. R. Co. *et al.* } No. 94.

Supplemental answer filed. Continued.

WEDNESDAY, *October 26th*, 1887.

Court met pursuant to adjournment.

J. D. PARKER *et al.*
vs.
THE N. O., B. R. & V. R. R. Co. *et al.* } No. 94.

Agreement of solicitor for W. A. Hamlin filed.

This cause came on to be heard at this time on the merits. Upon

the conclusion of the introduction of evidence and argument of council the case was taken under advisement by the court.

By permission of court, solicitor- for co-complainants are allowed two weeks in which to file briefs, three weeks being allowed solicitors for complainants and defendants in which to file their briefs.

FRIDAY, *January 20th*, 1888.

Court met pursuant to adjournment.

JOHN D. PARKER
vs.
265 N. O., B. R. & V. R. R. Co.; W. A. HAMLIN, Intervenor. } No. 94.

Judgment for complainant and intervenor.

MONDAY, *February 20th*, 1888

Court met pursuant to adjournment.

JOHN D. PARKER
vs.
THE N. O., B. R. & V. R. R. Co.; THE N. O. Pacific R'y Co.; The Union Trust Co. of New York; S. D. McEnery, Governor of La.; John F. Dillon, & Henry M. Alexander; Walter A. Hamlin, Intervenor. } No. 94. In Equity.

Motion as to form of decree filed by respondents. Decree sustaining demurrer to cross-bill signed *nunc pro tunc.* Decree in favor of John D. Parker & decree in favor of W. A. Hamlin signed. Motion of appeal to operate as a supersedeas filed and allowed. Appeal made returnable to next term of Supreme Court of the United States according to law. Counsel for John D. Parker in open court takes cognizance of appeal and waives citation. Bond for appeal approved & filed.

Order Signed Nunc pro Tunc.

U. S. Circuit Court, Western Dist. La., February Term, A. D. 1888.
In Equity.

JOHN D. PARKER
vs.
N. O., B. R. & V. R. R. Co. *et al.* } No. 94.

266 This cause came on to be heard at January term, A. D. 1887, on demurrer to cross-bill herein filed and was argued by counsel for complainant and counsel for respondents, and it — thereupon ordered, adjudged, and decreed by the court that the said demurrer be sustained, and that said cross-bill be dismissed.

Done & signed this Feb'ry 20th, 1888, in open court *nunc pro tunc.*

(Sig.) ALECK BOARMAN, *Judge.*

(Endorsement:) Filed Feb'ry 20th, '88. E. J. Nolan, d'y cl'k.

267 *Decree in Favor of Jno. D. Parker, Complainant.*

U. S. Circuit Court, 5 Circuit, Western District La. In Equity. Febr'y Term, 1888, Shreveport.

JOHN D. PARKER
vs.
THE NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD Co.; The New Orleans Pacific R'y Co., The Union Trust Co. of New York, S. D. McEnery, Gov'r of La.; John F. Dillon & Henry M. Alexander; Walter A. Hamlin, Intervenor. } No. 94.

This cause came on to be heard at the Oct'r term, 1887, of this court, at Monroe, and was argued by counsel, and came on to be further heard at January term, 1888, and was further argued by counsel for respondents, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that there is due by the New Orleans, Baton Rouge & Vicksburg Railroad Company to the complainant, John D. Parker, twelve hundred dollars, the amount of thirty coupons, each for forty dollars, being the interest coupons up to and including Oct'r 1st, 1885, on bond No. 189, held with said coupons by said Parker, which bond was executed and issued by said New Orleans, Baton Rouge & Vicksburg Railroad Co., being one of a series of first-mortgage construction bonds issued by said company dated Oct'r 1st, 1870, payable at forty years, each for the sum of one thousand dollars, bearing interest at rate of eight per cent. per annum, payable semi-annually, with coupons for interest attached.

And also the further sum of twelve hundred dollars for thirty coupons, each for forty dollars, being the interest coupons
268 up to and including Oct'r 1st, 1885, on bond No. 1488 of the same series of bonds, executed and issued by said company and held by said Parker.

And it is further ordered, adjudged, and decreed that for these sums aggregating the amount of twenty-four hundred dollars there be judgment in favor of said John D. Parker & against said New Orleans, Baton Rouge & Vicksburg Railroad Company, with five per cent. per annum interest thereon from Oct'r 1st, 1885.

It is further ordered, adjudged, & decreed that the mortgage executed by said company on the 1st Oct'r, 1870—an authentic copy of which has been filed in evidence—to secure the payment of its first-mortgage construction bonds & the coupons thereon, including the coupons herein mentioned, covers and embraces certain lands granted by the United States to said company in aid of the construction *of the construction* of its branch line from New Orleans to Baton Rouge & thence by way of Alexandria to connect with the line of the Texas Pacific railway, for which patents were issued by the United States to the New Orleans Railway Company, assignee of the New Orleans, Baton Rouge & Vicksburg Railroad Company, which lands are particularly described in lists No. 1 and No. 3 of

lands so patented, issued by the U. S. land office at New Orleans, and in lists No. 2 & 4 of lands so patented, issued by the U. S. land office at Natchitoches, which said lists are filed in evidence by complainant, marked, respectively, "List No. 1, Exhibit F;" "List No. 3, Exhibit F;" "List No. 2, Exhibit H;" "List No. 4,
269 Exhibit G;" which said lists are hereto annexed and made part of this decree.

It is further ordered, adjudged, and decreed that said mortgage exists in favor of said John D. Parker as holder & owner of said coupons and to secure payment of same, as a first mortgage on said lands, prior to all claims and mortgages set up by respondents herein.

It is further ordered, adjudged, and decreed that there be judgment in favor of the said John D. Parker and against all the defendants herein recognizing his mortgage rights as hereinbefore set forth.

And it is further ordered, adjudged, and decreed that the said lands hereinbefore described be sold, free from all liens, mortgages, & encumbrances whatever, to pay and satisfy said sum of twenty-four hundred dollars, with five per cent. per annum interest from Oct'r 1st, 1885, and all costs.

Done & signed in open court on this Feb'ry 20th, A. D. 1888.

(Sig.) ALECK BOARMAN, *Judge.*

Endorsement: No. 94. U. S. C. C., west. dist. La. John D. Parker *vs.* The N. O., B. R. & V. R. R. Co. *et als.* Decree favor of John D. Parker, complainant. Filed Febr'y 20th, '88. E. J. Nolan, d'y cl'k.

270 *Decree in Favor of Walter A. Hamlin, Co-complainant.*

U. S. Circuit Court, 5th Circuit, Western District La. In Equity. February Term, 1888, Shreveport.

JOHN D. PARKER
vs.
THE NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD Company, The New Orleans Pacific Railway Co., The Union Trust Company of New York, S. D. McEnery, Gov'n'r of La.; John F. Dillon & Henry M. Alexander; Walter A. Hamlin, Co-complainant. } No. 94.

This cause came on to be heard at the October term, 1887, of this court, at Monroe, and was argued by counsel, and came on to be further heard at January term and at Shreveport at present term, and was further argued by counsel for respondent, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that there is due by the New Orleans, Baton Rouge & Vicksburg Railroad Company to the said Walter A. Hamlin, co-complainant, six thousand dollars, the amount of one hundred and fifty coupons, each for forty dollars, being the interest coupons up to and including October 1st, 1885, on bonds numbered one, two, three, four, five, sued on herein, held with said coupons by said Hamlin, which bonds

were executed and issued by said New Orleans, Baton Rouge & Vicksburg Railroad Company, being five of a series of first-mortgage construction bonds issued by said company, dated Oct'r 1st, 1870, payable at forty years, each for the sum of one thousand dollars, bearing interest at rate of eight per cent. per annum,
271 payable semi-annually, with coupons for interest attached.

And it is further ordered, adjudged, and decreed that for said sum of six thousand dollars there be judgment in favor of said Walter A. Hamlin and against said New Orleans, Baton Rouge & Vicksburg Railroad Company, with five per cent. per annum interest thereon from Oct'r 1st, A. D. 1885.

It is further ordered, adjudged, and decreed that the mortgage executed by said company on the 1st Oct'r, A. D. 1870—an authentic copy of which has been filed in evidence and is an exhibit of the bill—to secure the *the* payment of its first-mortgage construction bonds & the coupons thereon, including the coupons herein mentioned, covers and embraces certain lands granted by the United States *by* said company in aid of the construction of its branch line from New Orleans to Baton Rouge, & thence by way of Alexandria to connect with the line of the Texas Pacific railway, for which patents were issued by the United States to the New Orleans Pacific Railway Company, assignee of the New Orleans, Baton Rouge & Vicksburg Railroad Company, which lands are particularly described in lists No. 1 and No. 3 of lands so patented, issued by the United States land office at New Orleans, and in lists No. 2 & 4 of lands so patented, issued by the United States land office at Natchitoches, which said lists are filed in evidence by complainant, marked respectively List No. 1, Exhibit F; List No. 3, Exhibit F; List No. 2, Exhibit H; List No. 4, Exhibit G; which said lists are hereto annexed and made part of this decree.

It is further ordered, adjudged, & decreed that said mortgage exists in favor of said Walter A. Hamlin, as owner & holder of said
272 coupons, and to secure payment of same as a first mortgage on said lands prior to all claims and mortgages set up by respondent herein.

It is further ordered, adjudged, and decreed that there be judgment in favor of said Walter A. Hamlin and against all the defendants herein, recognizing his mortgage rights as hereinbefore set forth & barring the rights of defendants.

And it is further ordered, adjudged, & decreed that the said lands hereinbefore described be sold, free from all liens, mortgages, and incumbrances whatever, to pay and satisfy said sum of six thousand dollars, with five per cent. per annum interest from Oct'r 1st, 1885, and all costs.

And the demurrer to the cross-bill in this cause having been heretofore maintained, the same has this day been dismissed by decree entered *nunc pro tunc* as of January, 1887.

Done & signed this Feb'y 20th, A. D. 1888.

(Sig.) ALECK BOARMAN, *Judge.*

(Endorsement:) No. 94. U. S. C. C., west. dist. La. John D.

Parker *vs.* The N. O., B. R. & V. R. R. Co. *et als.* Decree in favor of Walter A. Hamlin, co-complainant. Filed Feb'ry 20th, '88. E. J. Nolan, d'y cl'k.

273 U. S. Circuit Court, W. D. of Louisiana.

JOHN D. PARKER, &c.,
vs.
THE NEW ORLEANS, BATON ROUGE & VICKSBURG R. R. Co. *et als.*
} No. 94. In Equity. February Term, Shreveport.

On motion, in open court, of Dillon & Swayne and Howe & Prentiss, solicitors of the New Orleans Pacific Railway Company, and of John F. Dillon and Henry M. Alexander, trustees, respondents herein, and on suggesting that there is error to their prejudice in the decrees signed and entered herein on the 20th day of February, A. D. 1888, at this present term, at Shreveport, Louisiana, in favor of John D. Parker, complainant, and in favor of Walter A. Hamlin,
co-complainant, as well as in the order or decree, also this day
274 made *nunc pro tunc*, sustaining demurrer to cross-bill and dismissing said cross-bill—

It is ordered that an appeal be granted to the said New Orleans Pacific Railway Company and the said John F. Dillon and Henry M. Alexander, trustees, from said decrees and the whole thereof to the Supreme Court of the United States, returnable to said court at its next term, at the city of Washington, D. C., on the second Monday of October, 1888; the said appeal to operate as a supersedeas of said decrees on the appellants furnishing good and sufficient security in the sum of five thousand dollars to answer for damages and costs.

And the said security, in a bond signed by George J. Gould
275 and Grenville M. Dodge, being herewith filed is approved.

ALECK BOARMAN, *Judge.*

Feb'y 20, 1888.

Citation on the above appeal waived for complainant John D. Parker.

A. H. LEONARD,
Solicitor for Jno D. Parker.

276 [Endorsed:] Filed Feb'ry 20th, '88. E. J. Nolan, d'y cl'k.

277 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Western District of Louisiana.

The President of the United States to John D. Parker, Walter A. Hamlin, The New Orleans, Baton Rouge & Vicksburg Railroad Company, Samuel D. McEnery (who is governor of Louisiana), and The Union Trust Company of New York, and each of them, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Wash-

ington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Louisiana, at Shreveport, La., wherein The New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, trustees, are appellants and you are appellees (the said appellants having filed the security required by law for supersedeas), to show cause, if any there be, why the decrees rendered against the said New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, &c., &c., as in said appeal mentioned, should not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 20th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

ALECK BOARMAN, *Judge.*

278 [Endorsed:] United States circuit court, western district of Louisiana. No. 94. —— —— *vs.* —— ——. Citation. Marshal's return.

279 & 280 U. S. Circuit Court, Western District of Louisiana, February Term, 1888, Shreveport.

JOHN D. PARKER, &c.,
vs.
THE NEW ORLEANS, BATON ROUGE AND VICKSBURG RAILROAD COMPANY *et als.* } No. 94. In Equity.

UNITED STATES OF AMERICA:

Know all men by these presents that we, The New Orleans Pacific Railway Company and George J. Gould & Grenville M. Dodge, are held and firmly bound, jointly and severally, unto John D. Parker and Walter A. Hamlin, complainant and co-complainant in the above-entitled suit, as well as to the other parties to said suit, to wit, Samuel D. McEnery, who is governor of Louisiana; The New Orleans, Baton Rouge and Vicksburg Railroad Company, and The Union Trust Company of New York, and to each of them, said obligees, *in solido* in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said obligees and to each of them, their successors, heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us, by himself and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 20th day of February, in the year of our Lord eighteen hundred and eighty-eight.

281 & 282 Whereas the said New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, trustees, having heretofore, to wit, on the 20th day of February, 1888, taken an appeal to the Supreme Court of the United States from and to reverse the decrees rendered on the 20th day of Febru-

ary, 1888, by the circuit court of the United States for the fifth circuit, holding sessions in and for the western district of Louisiana, in the suit above entitled, of John D. Parker (Walter A. Hamlin, co-complainant) against The New Orleans, Baton Rouge and Vicksburg Railroad Company *et als.*, No. 94 of the docket thereof, and from each and the whole thereof, said decrees being in the favor of said John D. Parker, complainant, and of Walter A. Hamlin, co-complainant:

Now, the condition of the above obligation is that if the above-named appellants shall prosecute their said appeal to effect and shall answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

NEW ORLEANS PACIFIC RAILWAY COMPANY,
By E. B. WHEELOCK, *President.* [SEAL.]

[Seal New Orleans Pacific Railway Company.]

Attest: ROB'T STRONG, *Secretary.*

GEORGE J. GOULD. [SEAL.]
G. M. DODGE. [SEAL.]

283–287 UNITED STATES OF AMERICA, }
City, County, and State of New York, } *ss:*

Personally appeared Geo. J. Gould and G. M. Dodge, who, being duly sworn, each deposes and says that he is one of the obligors on the within bond; that he resides in the city of New York, and each is worth the full sum of ten thousand dollars over and above all his debts and liabilities and property exempt from execution.

GEORGE J. GOULD.
G. M. DODGE.

Subscribed and sworn to before me this — day of Feb'y, 1888.

[Seal William J. Harding, Notary Public, Kings County, N. Y.]

WM. J. HARDING,
Notary Public, New York and Kings Counties, State of New York.

I have no objection to the sureties on this bond.

A. GOLDTHWAITE,
Sol'r for W. A. Hamlin.

Febr'y 18, '88.

This bond approved.

ALECK BOARMAN, *Judge.*

Shreveport, Feb'y 20, 1888.

288 [Endorsed:] No. 94. U. S. circuit court, western district of Louisiana. John D. Parker *et al. vs.* New Orleans, Baton Rouge & Vicksburg R. R. Co. *et als.* Bond for appeal. Filed Febr'y 20th, 1888. E. J. Nolan, d'y cl'k. (Original.)

289 THE UNITED STATES OF AMERICA,
5th Circuit, Western District of Louisiana.

In Circuit Court.

I, John W. Wheaton, clerk of the U. S. circuit & district courts, 5th circuit & western district of Louisiana, hereby certify that the above and foregoing two hundred and ninety and a half pages, from 1 to 290½, inclusive, contain a true, faithful, & complete transcript of all documents filed, orders made, proceedings had, & evidence adduced in case No. 94, John D. Parker *vs.* The New Orleans, Baton Rouge & Vicksburg Railroad Company *et al.*, Walter A. Hamlin, intervenor, on the docket of said court.

Seal U. S. Circuit Court for the Western Dist. of La.

Given under my hand & seal of office this the 14th day of July, A. D. 1888.

J. W. WHEATON.

THE UNITED STATES OF AMERICA,
5th Circuit, Western District of Louisiana.

I, Aleck Boarman, judge of the circuit & district courts, 5th circuit & western district of Louisiana, held in & for the western district of Louisiana, the same being a court of record, do hereby certify that John W. Wheaton, whose genuine official signature and seal are affixed to the foregoing certificate, is and was at the time he signed the same the clerk of said U. S. circuit & district
290 courts, duly commissioned & qualified.

I further certify that the foregoing attestation of the said clerk is in due form and by the proper officer and is entitled to full faith and credit.

This done & signed in open court this the 14th day of July, A. D. 1888.

ALECK BOARMAN, *Judge.*

UNITED STATES OF AMERICA,
5th Circuit, Western District of Louisiana.

I, John W. Wheaton, clerk of the United States circuit & district courts, 5th circuit & western district of Louisiana, do hereby certify that Hon. Aleck Boarman, whose genuine signature is signed to the foregoing certificate, is and was at the time he signed said certificate judge of the district & circuit courts of the United States for the 5th circuit and western district of Louisiana, duly commissioned and qualified.

Witness my hand and the seal of the said court this the 14th day of July, A. D. 1888.

[Seal U. S. Circuit Court for the Western Dist. of La.]

J. W. WHEATON, *Clerk.*

291 *Minutes of the Court.*

MONROE, FRIDAY, *April 16th*, 1886.

Court met pursuant to adjournment.

JOHN D. PARKER *et als.* *vs.* N. O., B. R. & V. RAILROAD. } No. 94, Shreveport Docket. In Equity.

In this cause, on application of complainant, it is ordered that the defendants named in the bill plead, demur, or answer thereto on or before the 3rd Monday of June next; that this order be published in some public journal published in Shreveport once a week for six (6) successive weeks prior to the said third Monday in June.

W. H. Wise, Esqr., solicitor for New Orleans & Texas Pacific R. R., in open court takes cognizance of said order and waives notice.

SHREVEPORT, WEDNESDAY, *August 4th*, 1886.

Court met pursuant to adjournment.

JOHN D. PARKER *vs.* N. O., B. R. & V. R. R. Co. *et als.* } No. 94. In Equity.

Demurrer Overruled.

On motion of A. H. Leonard, Esq., solicitor for plaintiffs, and on suggesting to the court and due proof thereof that notice has been given all defendants by publication in accordance with pre-
292 vious orders of this court, and on further suggestion that several defendants, viz., The New Orleans, Baton Rouge & Vicksburg Railroad Company, The Union Trust Company of New York, and S. D. McEnery, governor of Louisiana, have made no appearance, it is ordered that as against said defendants there be judgment *pro confesso*.

(Sig.) ALECK BOARMAN, *Judge.*

Aug. 4th, 1886.

OPELOUSAS, THURSDAY, *January 13th*, 1887.

Court met pursuant to adjournment.

JOHN D. PARKER *vs.* N. O., B. R. & V. R. R. Co. *et als.* } No. 94.

Motion to enlarge time for taking testimony filed and order granted.

SHREVEPORT, MONDAY, *March* 28*th*, 1887.

Court met pursuant to adjournment.

J. D. PARKER
vs.
N. O., B. R. & V. R. R. Co. *et als.* } No. 94.

Ordered by the court that the demurrer be sustained and that the cross-bill be dismissed.

293 SHREVEPORT, MONDAY, *July* 18*th*, 1887.

This being the third Monday of July, A. D. 1887, and the 18th day of July, A. D. 1887, and by law the first of the July term of the circuit court of the United States for the fifth judicial circuit, western district of Louisiana, the same was duly opened by the marshal.

J. D. PARKER
vs.
N. O., B. R. & V. R. R. Co. *et als.* } No. 94.

Supplemental answer filed. Continued.

MONROE, WEDNESDAY, *October* 26*th*, 1887.

Court met pursuant to adjournment.

JOHN D. PARKER *et als.*
vs.
N. O., B. R. & V. RAILROAD. } No. 94, Shreveport Docket. In Equity.

Agreement of solicitor for W. A. Hamlin & Co., co-complainant filed.

This cause came on to be heard on the merits. Upon conclusion of the introductions of the evidence and argument of counsel the case was taken under advisement by the court. By permission of court solicitors for co-complainants are allowed two weeks in which to file briefs, three weeks being allowed solicitors for complainants and defendants in which to file their briefs.

294 OPELOUSAS, FRIDAY, *January* 20*th*, 1888.

Court met pursuant to adjournment.

JOHN D. PARKER
vs.
N. O., B. R. & V. R. R. Co., W. A. HAMLIN, Intervenor. } No. 94, Shreveport Docket.

Judgment for complainant and intervenor.

SHREVEPORT, *February* 20*th*, 1888.

This being the third Monday of February, A. D. 1888, and by law the first day of the February term of the circuit court of the United States for the fifth judicial circuit and western district of Louisiana, the same was duly opened by the marshal.

JOHN D. PARKER
vs.
THE N. O., B. R. & V. R. R. Co., THE N. O. Pacific R'y Co., The Union Trust Co. of New York, S. D. McEnery, Gov'n'r of La.; John F. Dillon & Henry M. Alexander; Walter A. Hamlin, Intervenor.
No. 94. In Equity.

Motion as to form of decree filed by respondents. Decree sustaining demurrer to cross-bill signed *nunc pro tunc*. Decree in favor of John D. Parker & decree in favor of W. A. Hamlin
295 signed. Motion of appeal to operate as a supersedeas filed and allowed. Appeal made returnable to next term of Supreme Court of the United States, according to law.

Counsel for John D. Parker takes cognizance of appeal and waives citation. Bond for appeal approved & filed.

(Decrees filed, entered, & recorded, which come in here as part of this day's minutes of court.)

CLERK'S OFFICE.

I certify the foregoing to be a true extract from the minutes of this court.

Witness my hand and seal of said court, at the city of Shreveport, this 20th day of August, 1888.

[Seal U. S. Circuit Court for the Western Dist. of La.]

E. J. NOLAN, *D'y Cl'k.*

296 United States Circuit Court, Western District of Louisiana.
In Equity.

JOHN D. PARKER
vs.
THE N. O., BATON ROUGE & VICKSBURG R. R. Co. *et als.*
No. 94. On Appeal to U. S. Sup. Court.

It is agreed that the patents offered in evidence herein by complainant need not be copied in the transcript on appeal in this cause, but that the following copy of one of them (omitting the description of the lands) may be inserted and may be used as a sample
297 of the said patents, it being also agreed that the quantity & location of the lands so patented are correctly stated in the original bill of complainant:

298 THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas by the act of Congress approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," there was granted to said Texas Pacific Railroad Company for the purposes of aiding in the construction of its railroad and telegraph line "every alternate section of public land not mineral, designated by

odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as such line may be adopted by said company through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California where the same shall not have been sold, reserved, or otherwise disposed of by the United States and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed;"

And whereas, by section twenty-two of said act, there was
299 granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, its successors and assigns, in aid of the construction of a railroad from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with said Texas Pacific railroad at its eastern terminus, the same number of alternate sections of public lands per mile in the State of Louisiana as were by said act granted in the State of California to said Texas Pacific Railroad Company;

And whereas said New Orleans, Baton Rouge and Vicksburg Railroad Company did, on the fifth day of January, one thousand eight hundred and eighty-one, assign and convey all its right, title, and interest in or to the grant of lands aforesaid to the New Orleans Pacific Railway Company, chartered by the State of Louisiana, as shown by the original deed of assignment filed in the General Land Office February 25th, 1881;

And whereas, on March 19th, 1883, the Secretary of the Interior transmitted to the General Land Office an official statement showing that the New Orleans Pacific Railway Company had con-
300 structed and equipped in the manner required by said act of March 3, 1871, a railroad from Whitecastle, in the State of Louisiana, to a connection with the Texas and Pacific railway in the city of Shreveport, in said State, a distance of two hundred and sixty miles, and that, pursuant to the report of the commissioner appointed under the provisions of section eighteen of said act, said railroad had been accepted by the President in conformity with said act;

And whereas certain tracts of land in the State of Louisiana have been selected under the act aforesaid by Felix Reynaud, the duly authorized land agent of the New Orleans Pacific Railway Company, as shown by his original lists of selections in the New Orleans district, dated November 13 and December 28, 1883, and certified by the register and receiver of the land office in said district on the same dates. The said tracts of lands lie coterminous with the constructed line of road and are particularly described as follows, to wit:

(Here follows description of lands.)

Now know ye that the United States of America, in consideration of the premises and pursuant to the said act of Congress,
301 have given and granted, and by these presents do give and grant, unto the said New Orleans Pacific Railway Company, successor and assignee as aforesaid, and to its successors the tracts

of land described in the foregoing, excluding and excepting, however, all "mineral" lands, should any such be found in the tracts aforesaid; but this exclusion and exception, according to the terms of the statute, "shall not be held to include iron or coal;"

To have and to hold the same, with the appurtenances, unto the said New Orleans Pacific Railway Company and to its successors and assigns forever.

In testimony whereof I, Chester A. Arthur, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

302 Given under my hand, at the city of Washington, on the third day of March, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

Seal of United States General Land Office.

By the President: CHESTER A. ARTHUR,
By M. McKEAN, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 10, page- 1 to 45, inclusive.

September 21, 1888.

A. H. LEONARD,
Solicitor for Complainant.

303 JOHN D. PARKER, JR.,
vs.
THE N. O., B. R. & V. R. R. Co.

(On appeal in case No. 94 in equity.)

THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Western District of Louisiana.

The President of the United States to John D. Parker, Walter A. Hamlin, The New Orleans, Baton Rouge & Vicksburg Railroad Company, Samuel D. McEnery (who is governor of Louisiana), and The Union Trust Company of New York and each of them, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Louisiana, at Shreveport, La., wherein The New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, trustees, are appellants and you are appellees (the said appellants having filed the security required by law for supersedeas), to show cause, if any there be, why the decrees rendered against the said New Orleans Pacific Railway Company and John F. Dillon & Henry M. Alexander, &c., &c., as in

said appeal mentioned, shou'd not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 20th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

ALECK BOARMAN, *Judge.*

A true copy.

[Seal U. S. Circuit Court for the Western Dist. of La.]

Attest: E. J. NOLAN, *D'y Clerk.*

304 [Endorsed:] Original. United States circuit court, western district of Louisiana. No. 94. Parker *et al. vs.* N. O., B. R. & V. R. R. Co. Citation.

Marshal's Return.

STATE OF LOUISIANA,
Parish E. B. Rouge.

Alvan E. Read, being duly sworn, says that on the 24th day of April, 1888, he served the within citation on Samuel D. McEvery, governor of Louisiana, by delivering to him a duplicate thereof and leaving the same with him.

ALVAN E. READ.

Sworn before me April 26th, 1888.

{Seal Samuel G. Laycock, Notary Public, Parish of East Baton Rouge, State of Lousiana.}

SAMUEL LAYCOCK, *Not. Pub.*

305 U. S. Circuit Court, W. D. of La.

JOHN D. PARKER, &c.,
v.
N. O., B. R. & V. R. R. Co. *et al.* } No. 94. In Equity.

Agreement as to Transcript.

Appeal being taken in this case in open court at same term at which decree — entered, citations are waived.

Appellants may, if they choose, omit from the transcript the copies of patents and lists of selections annexed as exhibits to the bill.

Acts of Congress and State statutes referred to in pleadings or offered in evidence may also be omitted from transcript and referred to on appeal in volumes of laws.

Of the bonds offered but one bond of complainant Parker and one of co-complainant Hamlin need be copied, with one coupon of each, as samples of the respective lots, with brief statement of
306 number and date of coupons.

Feb'y 20, 1888.

ALFRED GOLDTHWAITE,
Sol'r for W. A. Hamlin, Co-complainant.

Citation waived for the administrator of W. A. Hamlin.
April 23, 1888.

A. GOLDTHWAITE,
Solicitor for F. V. Hamlin, Admin'r.

307 [Endorsed:] No. 94. U. S. circuit court, W. D. of La. John D. Parker, &c., *vs.* N. O., B. R. & V. R. R. Co. Agreement and waiver of citation for W. A. Hamlin and F. V. Hamlin, ad'r.

308 JOHN D. PARKER, &c.,
vs.
THE N. O., B. R. & V. R. R. Co.

On appeal in case No. 94 in equity.

THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Western District of Louisiana.

The President of the United States to John D. Parker, Walter A. Hamlin, The New Orleans, Baton Rouge and Vicksburg Railroad Company, Samuel D. McEnery (who is governor of Louisiana), and The Union Trust Company of New York and each of them, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Louisiana, at Shreveport, La., wherein The New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, trustees, are appellants and you are appellees (the said appellants having filed the security required by law for supersedeas), to show cause, if any there be, why the decrees rendered against the said New Orleans Pacific Railway Company and John F. Dillon & Henry M. Alexander, &c., &c., as in said appeal mentioned should not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 20th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

ALECK BOARMAN, *Judge.*

A true copy.
Attest:
[Seal U. S. Circuit Court for the Western Dist. of La.]

E. J. NOLAN, *D'y Clerk.*

309 [Endorsed:] United States circuit court, western district of Louisiana. No. 94. Parker *et al. vs.* The N. O., B. R. & V. R. R. Co. Citation.

Service of the within citation is admitted this 24th day of February, 1888.

SIMPSON, THACKER & DUNCAN,
Att'ys for the New Orleans, Baton Rouge and Vicksburg Railroad Company.

For Return.

I hereby admit service of a copy of the within citation upon the Union Trust Company of New York this 24th day of February, 1888.

THE UNION TRUST CO. OF N. Y.,
By WHEELER H. PERKHAM, *Solicitor.*

310 In the Supreme Court of the United States.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY and JOHN F. DILLON and HENRY M. ALEXANDER, Trustees, &c., Appellants,
vs.
JOHN D. PARKER, F. V. HAMLIN, *et als.*, Appellees.
} Appeal Returnable to October Term, 1888.

And now come The New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, trustees, appellants herein, and assign for error in the decrees appealed from herein as follows:

First. The court below erred in overruling the demurrer interposed to the bill of complaint herein.

Second. The court below erred in sustaining the demurrers to the cross-bill which was filed by these appellants.

Third. The court below erred in dismissing said cross-bill.

Fourth. The court below erred in rendering the final decrees in favor of the complainant Parker and the complainant Hamlin.

311 Fifth. The court below erred in adjudging the bonds and mortgage sued upon by complainant and co-complainant to be the acts and deeds of the New Orleans, Baton Rouge & Vicksburg Railroad Company.

Sixth. The court below erred in decreeing the mortgage sued upon by complainant and co-complainants to be a lien on the lands granted by the 22d section of the act of Congress of March 3, 1871, set forth in the bill.

Seventh. The court erred in denying the claim of appellants that the mortgage made by the New Orleans Pacific Railway Company to Dillon and Alexander, trustees, is the first lien on the lands

granted by the said 22d section of the act of Congress of March 3, 1871.

Eighth. The court below erred in holding that the claims of the complainant (even if having any force, which is denied) were not barred by the laches set up in the answer.

Ninth. The court below erred in denying to appellants the equities claimed in the answers and established by the evidence arising from the definite location and building of the railway by the New Orleans Pacific Company, the earning by it of the lands in question, and the mortgaging of the lands to pay for the construction of the road and the expenditures by appellants for patents and taxes.

312 Tenth. The court below erred in denying the rights claimed by appellants under the act of Congress of February 8, 1887.

And for these errors and others apparent on the face of the record appellants pray that the decrees appealed from be reversed and the bill of complaint dismissed, and for such other and further orders, decrees, and relief as may be just.

W. W. HOWE,
JOHN F. DILLON,
WAGER SWAYNE,
For Appellants.

313 [Endorsed:] In the Supreme Court of the U. S. The New Orleans Pacific R'y Co. *et als.*, appellants, *vs.* John D. Parker *et als.*, appellees. Assignment of errors.

314 United States Supreme Court. No. 137. October, 1891.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY *et al.*
vs.
JOHN D. PARKER *et al.*

It is hereby stipulated that in printing the record in this cause the list of selections of lands by the New Orleans Pacific Railway Company, referred to as exhibits of the bill, may be omitted from such printed record, with leave, however, to either party or to the court to refer to the lists in the manuscript transcript on file as may be deemed necessary, the object of this agreement being to save needless expense.

New Orleans, August 1st, 1891.

A. H. LEONARD,
Att'y for Plaintiff J. D. Parker,
HOWE & PRENTISS.
W. W. HOWE.

314½ [Stamped:] Office Supreme Court U. S. Filed Sept. 1, 1891. James H. McKenney, clerk.

315 [Endorsed:] Supreme Court U. S. 1891, October term. No. 137. The New Orleans Pacific Railway Co. *et al. vs.*

Jno. D. Parker *et al.* Stipulation to omit portion of transcript in printing.

[Stamped:] Office Supreme Court U. S. Filed Sep. 1, 1891. James H. McKenney, clerk.

Endorsed on cover: Case No. 13148. W. Louisiana C. C. U. S. No. 137. The New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, trustees, appellants, *vs.* John D. Parker, Walter A. Hamlin, The New Orleans, Baton Rouge & Vicksburg Railroad Company, Samuel D. McEnery, governor of Louisiana, and The Union Trust Company of New York. Filed October 1, 1888.

[*Record No. 13,148.*]

SUPREME COURT OF THE UNITED STATES.

No. 137, October, 1891.

The New Orleans Pacific Railway Company Et Al., Appellants,

versus

John D. Parker Et Als., Appellees.

To complete the transcript made by the late clerk, and correct its arrangement and clerical errors, it is agreed and consented:

That the "statement of evidence adduced in said cause," and "note of evidence of respondents" being pp. 25 and 26 of printed record or transcript, were the offers and stipulations in open Court at the final hearing October 26, 1887, by and on behalf of the respective parties appearing in the cause; and the several documents *preceding* said statement or notes of evidence from pp. 11 to 24, inclusive, are documents offered by complainant and co-complainant, as so stated at p. 25. A document also so offered, but lost, showed that the mortgage of 1870 was recorded in the Parish of St. Landry in October, 1870.

The evidence so offered by the respondents, save that omitted by consent, as noted at p. 26 and elsewhere, is found at pp. 38 to 77, inclusive, and pp. 92 to 97, inclusive; the maps "L. G. 3," referred to in testimony of E. B. Wheelock, p. 43, being interleaved between pp. 96 and 97.

The motion or protest as to form of decree mentioned in minutes of February 20, 1888, pp. 99, as having been filed by respondents, is hereto annexed in certified copy, and having been omitted by said clerk, may be added to the transcript at p. 99.

The minute entries set forth at pp. 107 to 111 of transcript, should have been inserted prior to the clerk's certificate, and may be considered as if so inserted.

The following errata are also agreed to:

Page 2, line 30, after "in" insert "coin;" and in line 41, after "not" insert "to."

Page 7, last line, after "also" insert "all."

Page 7, second line from bottom, for "New Orleans and Pacific Railroad," read "New Orleans Pacific Railway."

Page 8, line 13 from top, after "to" insert "the New Orleans Pacific Railway Company as assignee of."

Page 9, line 18, for "on" read "in;" and in 21 line before "subordinate" insert "and."

Page 12, line 21, for "the" read "their."

Page 36, last line, for "18th" read "17th."

Page 43, line 1, for "respondent" read "respondents;" and for "offers," "offer."

Page 83, line 26, for "lands" read "bonds;" and in line 40, for "patented" read "prior."

Page 100, 3 line from bottom, after New Orleans insert "Pacific."

Page 21, second line, after "of" insert "way."

Page 102, line 18, for "by" read "to;" and in line 35, for "respondent" read "respondents."

Page 78, in title of cause in replication, after "N. O. B," insert "R."

Page 90, in title of cause after "&" insert "V."

It is further agreed that all Acts of the General Assembly of Louisiana, and of Congress, mentioned in the pleadings and notes of evidence, may be referred to by the parties in the published statutes.

A. H. LEONARD,
Attorney for Complainant Parker.
W. W. HOWE,
For Respondents, Appellants.

Alfred Goldthwaite
for Adm of Hamlin,
deceased

UNITED STATES CIRCUIT COURT

WESTERN DISTRICT OF LOUISIANA.

JOHN D. PARKER, W. A. HAMLIN, Co-Complainant,

versus [No. 94

NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD Co. Et Als.

To the Honorable A. Boarman, Judge:

It being proposed by complainant Parker, that there should be two final decrees entered in this cause, one in his favor and one in favor of co-complainant, Hamlin; the New Orleans Pacific Railway Company and John F. Dillon, and Henry M. Alexander, trustees, beg leave to submit that the only claim against them is upon an alleged mortgage which is indivisible, and that but one decree should be entered as proposed also by co-complainant, Hamlin, and they therefore submit this protest.

HOWE & PRENTISS,
DILLON & SWAYNE,
For said Respondents.

FEBRUARY 20th, 1888.

CLERK'S OFFICE U. S. CIRCUIT COURT, WESTERN DISTRICT OF LOUISIANA.

I hereby certify the above is a true and correct copy of the original on file in my office.

Witness my hand and Seal of said Court at the City of Shreveport, La., this the 24th day of October, A. D., 1891.

J. B. BEATTIE,
Clerk.

Office Supreme Court U. S.
FILED.
DEC 31 1891
JAMES H. McKENNEY.
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 137.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY AND JOHN F. DILLON AND HENRY M. ALEXANDER, TRUSTEES,

Appellants,

vs.

JOHN D. PARKER ET ALS.,

Appellees.

NOTES AND DATA FOR ORAL ARGUMENT.

JOHN F. DILLON,

For Appellants.

C. G. BURGOYNE, WALKER AND CENTRE STS., NEW YORK.

INDEX.

	PAGE
Statement of Case	1
Mortgage of October 1, 1870, not a lien on the lands patented March 3, 1885, to New Orleans Pacific Co	4
No authority of law in Backbone Co. to make mortgage of future lands	4
No attempt of Backbone Co. to exercise power to mortgage after-acquired lands	6
Section 11 of Act of March 3, 1871, reprinted	10
Backbone Co. never acquired any title to the lands patented to New Orleans Pacific Co. March 3, 1885	12
Section 22 of Act of March 3, 1871, reprinted	13
Title of New Orleans Pacific Company to the lands patented to it March 3, 1875, is perfect and complete under the Act of February 8, 1887	20
Section 2 of Act of February 8, 1887, reprinted	21
Other sections of Act of February 8, 1887, briefly stated	22
The Blanchard-Robinson Agreement of Jan. 4, 1882, reprinted	23
Regulations prescribed by Secretary of Interior under date of June 6, 1887, as to rights of settlers	27
Equities of the bondholders under New Orleans Pacific mortgage to Dillon and Alexander superior to any equities of bondholders under mortgage of October 1. 1870, by Backbone Co.	33
The final decrees in this case are not only anomalous and grotesque, but fatally erroneous	36
The twin decrees are absurd and inequitable	39
The value of the matter in controversy is the value of the whole mortgage security	44

Supreme Court of the United States,

OCTOBER TERM, 1891.

No. 137.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY and JOHN F. DILLON and HENRY M. ALEXANDER, Trustees,
Appellants,

AGAINST

JOHN D. PARKER ET ALS.,
Appellees.

Notes and Data for Oral Argument.

JOHN F. DILLON, for Appellants.

THIS SUIT is a class or representative suit, being brought by PARKER "for himself and all parties holding bonds and coupons similar to those herein

set forth" (Record, p. 1). He avers that he holds two bonds, numbered 1488 and 189, secured by the mortgage of the defendant The New Orleans, Baton Rouge and Vicksburg Railroad Company (commonly called, and hereinafter often referred to as, the "Backbone Company"), dated October 1, 1870 (see copy of the mortgage in the Record, pp. 11–14).

THE PRAYER is that he may have judgment against the Backbone Company for the amount of the matured coupons on his two bonds, and "that the lands hereinbefore described be held subject to the mortgage to secure the payment of the said bonds and coupons as hereinbefore set forth, and that the said mortgage be recognized and enforced, and that the said lands be sold to pay and satisfy the amount so due him," and for general relief. (Note that he does not ask to have the railroad mortgaged sold, but only the "said lands hereinbefore described," meaning the lands which were patented on March 3, 1885, to the defendant The New Orleans Pacific Railway Company). A copy of the patents to the last-named Railway Company is contained in the record, pp. 109–111.

HAMLIN, one of the appellees, and the holder of five bonds of the same issue as those held by

PARKER, was duly made a co-complainant (Record, pp. 89, 90).

THE DECREE below in favor of Parker (Record, pp. 90, 100, 101), and the SEPARATE DECREE in favor of Hamlin (Record, pp. 101–103) follow the prayer of the bill, and decree respectively to Parker and Hamlin the amount of the past due coupons and that the bonds and the coupons thereon be paid, and accordingly rendered a judgment and decree therefor against the Backbone Company. It was further decreed that the said first mortgage to secure the bonds and coupons issued thereunder covers and embraces the lands so patented to the New Orleans Pacific Railway Company. It also decreed the mortgage of October 1, 1870, to be a first mortgage on the said lands prior to all claims and mortgages set up by the respondents, and that the said patented lands be "sold free from all liens, mortgages and encumbrances whatever," to pay the amount found due to Parker and Hamlin respectively.

The lands so adjudged to be subject to the said mortgage of October 1, 1870, are lands which it is claimed by the complainants were granted to the Backbone Company by the 22d section of the Act of Congress of March 3, 1871 (the Texas Pacific

Charter). They were, therefore, lands which had not at the time of the execution of the mortgage of October 1, 1870, been granted to or in any way acquired by the Backbone Company and to which it had no right whatever, not even an incipient or inchoate right of any kind whatever.

FIRST PROPOSITION.

The mortgage of October 1, 1870, is not a lien and never was a lien on the lands which were patented on March 3, 1885, by the United States to the New Orleans Pacific Railway Company. The decree so adjudging is fundamentally erroneous on several distinct grounds:

FIRST. *Because under the general statutes and jurisprudence of Louisiana, as well as under the special charter of the Backbone Company, there existed on October 1st, 1870,* NO AUTHORITY OF LAW IN THE BACKBONE COMPANY TO MAKE A MORTGAGE OF FUTURE LANDS, *that is of lands which at the date of the mortgage it had not*

acquired and to which it had no claim or pretense of right.

The argument in support of this ground is fully stated by Mr. HOWE in our brief, pp. 49–53, 57–61, and by Circuit Judge PARDEE in his opinion in the case of The New Orleans Pacific Railway Company vs. The Union Trust Company, 41 Fed. Rep., 717, reprinted in our brief, at pages 36–40. At the pages therein referred to will be found collected the statute provisions of Louisiana and the decisions of her Courts upon this subject. Judge PARDEE's conclusion as to the effect of the general statutes and jurisprudence of Louisiana on the point is thus stated:

"From these statutes and decisions of the Courts it seems clear that under the general laws of Louisiana the only after-acquired property that can be covered by a railroad mortgage is the after-acquired property forming part of the organism of the railroad, or, in other words, forming a part of the railroad and its appurtenances."

After reviewing the special provisions of the Backbone charter of 1869 on the subject of the power to mortgage (reprinted in Appendix to our brief, pp. 71–76), Judge PARDEE expresses his conclusion in these words:

"I am satisfied that a land grant for the purpose of aiding in the construction of a railroad cannot be considered an appurtenance of said railroad, and that the language of the mortgage in question [of October 1, 1870], carefully considered, was not intended to cover the after-acquired land grant. As the general law of Louisiana does not authorize a mortgage of an after-acquired land grant, as the special authority to mortgage granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company did not contemplate or authorize the mortgage of such after-acquired grant, and as the language of the mortgage itself does not describe or include any such after-acquired grant, it is clear to me that the mortgage in question in this case does not and cannot be made to affect, by way of lien or otherwise, the thereafter acquired land grant of 1871."

The mortgage of 1870 was, therefore, no lien on the lands patented March 3, 1885, to the New Orleans Pacific Railway Company for want of AUTHORITY IN LAW to make such mortgage.

SECOND. *The mortgage of October* 1, 1870, *is no lien on the lands afterwards* (*March* 3, 1885)

patented to the New Orleans Pacific Railway Company, because even if power existed to mortgage after-acquired lands the mortgagor company, by the true construction of the mortgage, DID NOT ATTEMPT TO EXERCISE ANY SUCH POWER, BUT LIMITED THE MORTGAGE TO THE RAILROAD AND ITS APPURTENANCES.

The argument in support of this proposition is concisely stated by Judge PARDEE in his opinion above referred to; and it is elaborated by Mr. HOWE in our briefs with a very full citation of authorities (see Brief, pp. 41–50; and also Brief in Reply). The authorities in this Court and elsewhere there cited so completely sustain the above proposition that I am willing to leave it on the discussion in the briefs with the following additional observations:

(A) There has been much discussion in the books as to the power to mortgage after-acquired property. In appears that in Louisiana this is prohibited by statute, except so far as after-acquired property becomes part of the corpus or organism of a railway; but even aside from such statutory restrictions. the courts, while holding that after-acquired property may be mortgaged,

uniformly hold, also, that the purpose to include after-acquired property must plainly appear, and that such after-acquired property must be within the *description* of the mortgage.

Coe vs. Pennock, 23 How., at p. 130.
Brief, at p. 42, from Jones.

(B) The mortgage of October 1, 1870, on the plaintiff's theory, attached *eo instanti* on and after the passage of the Act of Congress of March 3, 1871, to the land grant thereby made, and this, although there is no reference to any such grant in the mortgage and no provisions in the mortgage for the administration of the grant.

If the plaintiff's theory is correct, then this large body of lands which Congress granted to aid in the construction of the road became at once subject to the lien of the mortgage of 1870 with no power in the trustee or company to utilize it or to sell the lands or to release the lien of the mortgage; the result of which would be that these lands would be tied up without power to utilize them or release the same from the mortgage until 1910, when the bonds secured by it mature. Such an act of lunacy was never before heard of, and certainly cannot be imputed to sane men.

(C) The validity of these conclusions is shown by the amendment of the Backbone Charter passed after the land grant, to wit: Act No. 100, approved December 11, 1872 (reprinted in Appendix to our Brief, pp. 76–79).

This act passed after the land grant expressly authorized the mortgage of the land grant, with this provision:

"The mortgage thus to be given to secure the payment of said bonds and coupons shall carry with it a FIRST LIEN AND PRIVILEGE upon the real and personal property and effects of said company, and ALL LANDS ACQUIRED BY ACT OF CONGRESS or otherwise"—

showing that the Legislature understood that the lands had *not* been previously mortgaged, and conferring the power not otherwise existing under the laws of Louisiana to make a mortgage upon them. This power was executed, as appears by the bill (Record, p. 9), and by the answer (Record, pp. 33, 36) by the execution by the Backbone Company of the mortgage of September 4, 1872, to secure "FIRST mortgage seven per cent. LAND GRANT and sinking fund gold bonds." This mortgage, as found in the Interior Department, makes an express grant of the land grant, and con-

tains the usual provisions for its administration by sale, application of proceeds and release of lien.

(D) The mortgage of October 1, 1870, professes to hypothecate (see Record, pp. 12, 13) the main line and several specified branches of railroads running in different directions east, north and west in the State of Louisiana, in all 501 miles, of which the branch from Baton Rouge to Shreveport, in respect of which the lands in question are claimed, is only 236 miles, more or less, in length (Record, pp. 12, 13).

If the plaintiff's theory is correct that Section 22 of the Act of March 3, 1871 (below quoted in full), is a present grant to the Backbone Company to which the mortgage of October 1, 1870, attached as soon as the Act of March 3, 1871, was passed, these lands are hypothecated, not only to build the branch line along which they lie, but are equally hypothecated in respect of the main line and the other branches. This would entirely defeat the purpose of Congress in making the grant, as specified in Section 22 of the Act of March 3, 1871, and is in direct conflict with Section 11 of that Act, which in express terms provides as follows:

"SEC. 11. That the Texas Pacific Railroad

Company shall have power and authority to issue *two kinds of bonds, secured by mortgage, namely:* FIRST, *construction bonds;* SECOND, *land bonds.* Construction bonds shall be secured by mortgage, first, on all or any portion of the franchises, road-bed, or track of said railroad, and all the appurtenances thereto belonging, when constructed or in the course of construction, from a point at or near Marshall, to ship's canal, in the Bay of San Diego, in the State of California, as aforesaid. Land bonds shall be secured by mortgage, first, on all or any portion of the lands hereby granted in aid of the construction of said railroad as is provided for in this Act; second, on lands acquired by any arrangement or purchase or terms of consolidation with any railroad company or companies to whom grants of land may have been made, or may hereafter be made, by any Congressional, State, or Territorial authority, or who may have purchased the same previous to any such arrangement or consolidation: Provided, that all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be a sufficient evidence of their legal execution, and shall confer all the rights and property of said company as therein expressed: And provided also, that the proceeds of the sales of the aforesaid construction and land bonds shall be *applied only in the construction, operation and equipment of the contemplated railroad line*: And provided further, that said mortgage shall in no wise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation."

That Section 11 applies in this respect to the provisions of the 22d Section appears from the language of the last named section, that the grant is expressly declared to be made "in aid of the construction from New Orleans to Baton Rouge, thence by way of Alexandria in said State to connect with the Texas Pacific Railroad at its eastern terminus;" and by the subsequent part of the section which provides that the lands shall be withdrawn, selected and patented in the same manner as in the Texas Pacific grant. It would, therefore, be legally impossible under the Act of Congress of March 3, 1871, which made the land grant, to mortgage these lands for any other purpose than to aid in the construction, etc., of the road from New Orleans to Shreveport, or to use the proceeds of the mortgage for any other purpose. Under these limitations in the said Act of Congress, the mortgage of 1870 would not be valid as a mortgage of the land grant even if it was intended to cover the land grant.

THIRD. *The mortgage of* 1870, *even if there was authority in law to make it embrace lands subsequently granted, and even if the company had attempted to exercise such authority, would be*

ineffectual, for the reason that the BACKBONE COMPANY NEVER ACQUIRED ANY TITLE TO THE LANDS *which were subsequently* (*March* 3, 1885) *patented to the New Orleans Pacific Railway Company—an entirely different company.*

This for the reasons following:

(A) The 22d Section of the Texas Pacific Charter, to wit, the Act of March 3, 1871, which contains the grant to the Backbone Company, is as follows:

"SEC. 22. That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said company with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by way of Alexandria in said State to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as by this Act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected and patents issued therefor, and opened for settlement and pre-emption, upon

the same terms and in the same manner and time, as is provided for and required from said Texas Pacific Railroad Company, within said State of California: Provided, that said company shall complete the whole of said road within five years from the passage of this Act."

This Section refers to Section 9 of the same act, that being the section making the land grant to the Texas Pacific Company. Section 9 contains the usual provision that

"There is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section * * * where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached *at the time of the line said road is definitely fixed.*"

Section 22 refers also to Section 12 of the same Act which contains this provision:

"Said company, within two years after the passage of this act, shall designate the *general route* of its road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories and twenty miles within the State of California, to be withdrawn from pre-emption, private entry and sale."

That is to say, this grant contains the usual and stereotyped provisions for a map of *general* route (Section 12) and for a map of the line of *definite location* (Section 9).

It is proved and is an indisputable fact in the case that the Backbone Company never filed any map of *definite* location, and that the only map which it ever filed was a map of its general route, which will be found between pages 14 and 15 of the Record.

UNDER THE SETTLED CONSTRUCTION of these provisions it is clear, although the words of the grant are *in præsenti*, that the whole grant was a "*float*" subject to the unrestricted dominion and disposition of the United States, and that no *title or right vested* in the Backbone Company to any lands, whether in *place or within the indemnity limits* at any time prior to the *definite* location of the road of the grantee company.

Such is the express condition of the grant as appears by Sec. 9, above quoted, of the Act of March 3, 1871. This language is a grant of alternate sections not "sold, &c., at *the time the line of said road* [*i. e.*, Backbone Road] *is definitely fixed.*"

The Backbone Company never having fixed any

line of definite location, the grant never attached in its favor even to lands *in place*, although it was what is called a grant *in præsenti*.

As to lands within the *indemnity limits* no title is acquired until *selection* of specific tracts by the grantee and approval thereof by the Secretary of the Interior, and no such selections were ever made by or for the Backbone Company.

As no definite location was ever made by the Backbone Company, and as that company never made any selections of lands, it necessarily results that the Backbone Company never acquired any right to any lands, and that the full title remained in the United States.

This result is made plain by the following (among other) decisions where the subject is specially considered.

Grinnell vs. Railroad Company, 103 U. S., 739.

Kansas Pacific vs. Atchison R. R. Co., 112 U. S., 414, 421.

St. Paul, &c., R. R. vs. Winona, &c., R. R., 112 U. S., 730, 731, and cases cited.

United States vs. M., K. & T. Ry. Co. (decided at this Term), 141 U. S., 358.

The first and only line of definite location ever made was made by the New Orleans Pacific Railway Company of *its* road, not of the road of the Backbone Company, for itself and not for the Backbone Company. This line is not coincident with that described in the map of general route filed by the Backbone Company. This is shown by the map of Louisiana inserted in the record between pages 96 and 97. This definite location by the New Orleans Pacific Railway Company of *its* road is adopted by Congress in Sec. 2 of the Act of February 8, 1887, to be considered further on.

The result, therefore, necessarily is that the mortgagor company, in 1870 or 1871, or at any other time, never had any *title* to the lands subsequently patented to the New Orleans Pacific Railway Company, and therefore they could not be held as the Court below decreed, to be embraced in or covered by the mortgage of 1870. This for the plain reason that it is a well established rule that even if after-acquired property may in Louisiana be mortgaged, the mortgage does not attach as a lien until and unless it is *acquired* by the mortgagor.*

* If there exist no statutory restraint (such as exists in Louisiana), equity will in proper cases sustain assignments of future acquisitions upon the ground stated by Lord WESTBURY in the

(B) The Backbone Company never acquired any right or any equity to the lands patented to the New Orleans Pacific Railway Company, because it is an admitted or established fact (Record, p. 42, fol. 145) that the Backbone Company NEVER CONSTRUCTED ANY RAILROAD, AND THEREFORE NEVER EARNED THEM.

(C) The Backbone Company never acquired any title or right to the lands, because it never complied with the proviso to the Act of July 31, 1876 (19 Stats., 121), as follows:

"And provided further, that *before* any land granted to any railroad company by the United States shall be conveyed to such company or any persons entitled thereto under any of the acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the

---

twice-argued case of Holroyd vs. Marshall, 10 H. L. Cas., 209. Referring to this case Mr. Bispham says (Equity, Part I., Ch. 8, Sec. 165):

"The true ground upon which this and similar decisions are to be placed appears to be that a court of equity enforces such assignments on the ground that the assignee is entitled to have immediate specific performance of the contract to assign as soon as the property comes into existence in the hands of the assignor. Neither in equity nor in law can a contract to assign property not then in existence, operate as an immediate alienation, for the simple reason that there is nothing to assign."

In the case at bar the lands patented to the New Orleans Pacific Company never came into existence in the hands of the Backbone Company. It never acquired them.

Treasury of the United States the cost of surveying, selecting and conveying the same by the said company or persons in interest."

It is proved in this case that the cost of surveying, selecting and conveying the lands which were patented March 3, 1885, to the New Orleans Pacific Railway Company, were paid by it to the United States as a condition of getting its patent to the said lands (Record, pp. 41, 42). And this Court has adjudged, in the case of the New Orleans Pacific Railway Company vs. The United States, 124 U. S., 124, that the New Orleans Pacific Railway Company was bound to pay the cost of surveying the lands before being entitled to receive a patent therefor, although such costs had been incurred and expended by the United States before the Act of March 3d, 1871, was passed. Until such costs of surveying, &c., are paid, this Court has four or five times adjudged (as will appear by its opinion in the case last mentioned) that though the lands are earned by the actual construction, the title remains so completely in the United States that they are not subject to taxation. It, therefore, appears that the mortgage of October 1, 1870, could not attach to these lands as after-acquired lands, for the reason that a mortgage of

after-acquired lands does not become effective until the property is ACQUIRED by the mortgagor; and in this case the mortgagor never ACQUIRED any title or right to the lands thus patented to the New Orleans Pacific Railway Company.

SECOND PROPOSITION.

The title of the New Orleans Pacific Railway Company to the lands patented to it March 3, 1875, free from any act or attempted hypothecation of the Backbone Company, which the decree subjected to the assumed lien of the plaintiff's mortgage of October 1, 1870, IS PERFECT AND COMPLETE UNDER THE ACT OF CONGRESS OF FEBRUARY 8, 1887, 24 U. S. Stats. at Large, 391 (reprinted in the Record, pp. 92-94).

The railroad was constructed by the New Orleans Pacific Company and by it alone, and such construction was after the five years limited therefor in the 22d section of the Act of March 3, 1871 (above quoted), had elapsed. Congress, therefore, in the first section of the Act of Feb-

ruary 8, 1887, forfeited certain lands and restored them to the public domain of the United States. Section 2 enacts as follows:

"That the title of the United States and of the original grantee to the lands granted by said Act of Congress of March 3, 1871, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October 27, 1881, and November 17, 1882, which indicate the definite location of said road: Provided, that all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession, or in possession of their heirs or assigns, shall be held and deemed excepted from said grant, and shall be subject to entry under the public land laws of the United States."

It thus appears that Congress fixed the definite location to be as to part of the road October 27, 1881, and as to the rest November 17, 1882, and it excepted all lands occupied by actual settlers at those dates.

This section, as reprinted in the record at page 93, is erroneous, in that it gives October 27, 1882, as the time when the map was filed by the New

Orleans Pacific Company in the Department of the Interior; as found in the Statutes at Large the dates of the filing of the maps are October 27, 1881, and November 17, 1882 (24 Stats., 391).

Section 3 of the Act of 1887 requires that the relinquishment and confirmation of lands in the Act provided for shall take effect upon the acceptance of the Act by the New Orleans Pacific Railway Company. That acceptance was made and filed with the Secretary of the Interior April 20, 1887 (see Record, p. 95).

Section 4 of the Act of 1887 makes it the duty of the Secretary of the Interior, in issuing patents, "to protect the settlers upon said lands and to give binding force and effect to the Blanchard-Robinson agreement made with the New Orleans Pacific Company on the 4th day of January, 1882, and filed in the office of the Secretary of the Interior" (Record, pp. 93, 94).

Section 5 of the Act of 1887 empowers the Secretary of the Interior to make all needful rules and regulations to carry the Act into effect.

Section 6 of the Act of 1887 declares that the patents for the lands conveyed already issued—meaning thereby the lands (by including the lands patented to the New Orleans Pacific Railway Company March 3, 1885) now in question—are con-

firmed, but subject to the provisions of this Act to protect any and all settlers in all their rights under the said sections of this act.

THE RULES AND REGULATIONS promulgated by the Secretary of the Interior to carry out this Act to protect settlers are reprinted in the Record at pages 94–96.

THE BLANCHARD-ROBINSON AGREEMENT (dated January 4, 1882), that is referred to in the Act of February 8, 1887, is on file in the office of the Secretary of the Interior, although not printed in the Record, was before Congress at the date of this Act, and is part of it. The text of that agreement, thus made part of the Act, is to be found in Senate Executive Documents No. 31, 48th Congress, 1st Session, and also House of Representatives Document, 49th Congress, 1st Session, to accompany House Bill 3186, and is reprinted therefrom, as follows:

An agreement, known as the Blanchard and Robertson agreement, was consummated, and is contained in a communication addressed to Messrs. Blanchard and Robertson by the New Orleans Pacific Railway Company, through its president, E. B. Wheelock, on January 4, 1882. Said communication is here inserted.

WASHINGTON, January 4, 1882.

GENTLEMEN—In consideration of the withdrawal by you of the protest and objection filed by you with the Department of the Interior against the recognition of the claims urged by the New Orleans Pacific Railroad Company, to the land grant made by the New Orleans, Baton Rouge and Vicksburg Railroad Company by the Act of Congress of 1871, and now claimed by the New Orleans Pacific Company, transferees of the New Orleans, Baton Rouge and Vicksburg Company, on behalf of the said New Orleans Pacific Company and any other railroad association or combination with which said New Orleans Pacific Company is connected, I hereby agree, consent and obligate myself and the said company and any other company or association connected with it that the right of settlers and occupiers on the land included within the limits of said grant shall be recognized and protected as follows, to wit:

Settlers and occupiers of any of the lands aforesaid up to this date shall be given the right within twelve months from the register of the patents issued by the Government to the said company or its transferees for said lands, in the office of the Clerk of the District Court and *ex-officio* recorder of conveyance and mortgages of the parish where the land wanted by such settlers or occupiers is situated, to file their applications with the railroad company, through agents to be designated by the company for the purpose, for the land claimed or wanted by them; such settlers or occupiers shall at the time the title-deeds are issued to them pay one-third in cash of the price of the land so occupied or settled by them, and shall have one and two years from that time, with 6 per cent. interest, in which to pay the remainder, mortgage and vender's privilege to be retained by the company.

The price of land to be paid by such settlers or occupiers shall not exceed $2 per acre, and the quantity of land to be claimed by each shall not exceed 160 acres.

Immediately upon the register of the patents in the office of the recorder of mortgages of the parishes affected by the land grant, the railroad company shall give notice by publication for ten days in a newspaper in the parish where any settlers or occupiers live, and also by publication at the Court House door of such

parish, the fact of the register of patents, and that the company is ready to receive application from settlers and occupiers for the land wanted by them, and indicating the place where, and person to whom, application should be made.

Should this notice not be given immediately upon the register of the patents, these settlers and occupiers are to have twelve months in which to file their application from the time of the giving of such notice aforesaid. Proof of occupancy shall be the same as required by the laws of the United States for the acquisition of public lands, if required by the company.

E. B. WHEELOCK,
President New Orleans Pacific Railway Company.

HONS. E. W. ROBERTSON and N. C. BLANCHARD,
Representatives in Congress from Louisiana.

Accepted on behalf of settlers and occupiers.

E. W. ROBERTSON,
Member of Congress, Sixth District of Louisiana.

N. C. BLANCHARD,
Member of Congress, Fourth District of Louisiana.

This proposition was accepted by said Blanchard and Robertson in behalf of the people who had settled on said granted lands by letter addressed to the Department of the Interior, dated January 4, 1882. Said letter is as follows:

WASHINGTON, January 4, 1882.

SIR—We hereby withdraw the opposition and protest filed by us to the recognition of the New Orleans Pacific Railroad Company as the grantees and transferees of the land in Louisiana granted by the Act of Congress of 1871 to the New Orleans, Baton Rouge and Vicksburg Railroad Company, and claimed by said New Orleans Pacific Company as transferees of the New Orleans, Baton Rouge and Vicksburg Company.

The object we had in filing said protest was the protection of the rights of settlers on the land covered by said grant, and as that has been obtained by agreement with the company, we do not wish to throw any further obstacle in the way of the recognition by the Department of the Interior of the rights claimed by the company.

The New Orleans Pacific Company have constructed the road running through the grant—that is to say, from New Orleans to Shreveport—and having obtained the funds with which to do so upon the faith of its right to the land grant, we think that justice demands the recognition of their claims to the land.

We are, sir, with great respect, your obedient servants,

E. W. ROBERTSON,
Member of Congress Sixth District of Louisiana.

N. C. BLANCHARD,
Member of Congress, Fourth District of Louisiana.

THE SECRETARY OF THE INTERIOR.

AN ALL-PERVADING AND CONTROLLING PURPOSE of Congress in the Act of February 8, 1887, was to protect actual settlers. This particularly appears in Sections 2, 4, 5 and 6. Under the provisions of the said Act, the duty was enjoined on the Secretary of the Interior "to protect settlers upon the said lands and to give binding force and effect to the Blanchard-Robinson agreement." It was intended that this should be done in said Section 4 "on the payment" by the said settlers "to *said company*, in lawful money of the United States, at the rate of two

dollars per acre, for the lands so occupied, at one-third cash and balance in such equal annual installments as the Secretary of the Interior shall prescribe." These regulations are prescribed under date of June 6, 1887 (Record, pp. 94–96). The Secretary of the Interior thus ordains as to the rights of settlers, both under Section 2 and Section 4:

"In all cases under Section 2 where the rights of entry under the laws of the United States shall have been fully established to lands which have been patented to the company [the New Orleans Pacific], the latter will be required to reconvey such lands to the United States, to the end that no cloud may rest upon the title of the entryman.

"In cases where the right of purchase under the fourth section of the act shall be established, the railroad company [the New Orleans Pacific] will be required to convey the land to the applicants upon the receipt of the first payments, and secure itself for the deferred payments by liens upon the land sold, or to enter into such contracts to convey the lands upon the receipt of the final installment, paid in the manner below described as usual, will be satisfactory to this office."

It thus appears that where lands had been actually patented to the New Orleans Pacific Railway Company which were occupied by actual settlers, *that* company was required by the acts and

executive regulations to reconvey the same to the United States, to the end that no cloud might rest upon the title of the entryman. All this assumes that *that* company has the full title, and not the Backbone Company. As to lands purchased under the Blanchard-Robinson agreement and not patented, the Act of February 8, 1887, regranted and confirmed the same to the New Orleans Pacific Railway Company, but the railway company was required to convey the lands to the settlers on receipt by it of the purchase money.

This shows unmistakably that Congress regarded the complete, unincumbered title and right to be in the New Orleans Pacific, and in it alone. That company has accordingly conveyed to such settlers many of these lands under the Blanchard-Robinson agreement. Now, if the plaintiff's contention is correct, and if the decrees below are right, these lands are subject to the assumed lien of the mortgage of October 1, 1870, *and may be sold under the decrees* AND THE TITLE OF THE SETTLERS DEFEATED. The title of such settlers, by the Act of Congress of 1887, comes by conveyances to be made by the New Orleans Pacific, and their right is assured by that Act. We therefore see the deep and profound significance

of the language of the second section of the Act of February 8, 1887, when it enacts "that the title of the *United States* AND of the *original grantee* * * * is relinquished, granted, conveyed and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company."

What was the title of the United States as against the Backbone Company? We have shown heretofore that, because of the failure of that company to make any definite location of the road, its failure to build any road, its failure to pay the costs of surveying, it had no title. The title was therefore in the United States, free of all liens, and the same free and absolute title that was in the United States in 1887 it granted and confirmed by the Act of February 8, 1887, to the New Orleans Pacific Company.

What was the power of the United States on the 8th of February, 1887, as against the Backbone Company? That is settled by this Court in the case of the New Orleans Pacific Railway Company vs. The United States, 124 U. S., 124. After referring to the failure on the part either of the Backbone Company or the New Orleans Pacific Company to commence or complete the work

within the time fixed by the Act of Congress making the grant, the Court there say:

"But we are of opinion that, while, on the failure of the company to complete its road within the time limited, Congress might adopt measures to secure its speedy completion, no limitation was imposed on the right and power of Congress, the company having failed even to commence the construction of any part of its road within the time limited, to virtually renew the grant and extend the time within which the land might be earned, with the imposition of a new condition that, before any patent should be issued, the cost of surveying the land patented should first be paid into the treasury."

And more to the same effect.

After citing the case of Farnsworth vs. Minnesota and Pacific R. R. Co., 92 U. S., 49, to the effect that a forfeiture upon failure to perform the work within the prescribed time might be declared as well by legislative act as by judicial decree, the Court proceed in substance to state that in the case then before it Congress was left entirely free to deal with the land grant as it might see fit. And accordingly in the present case Congress, in the Act of February 8, 1887, did deal with it by granting to the New Orleans Pacific not only the title of the *United States* (which was absolute),

but that of the *original grantee*, the Backbone Company (if it had any).

It may be said, however, that the Congress made this grant to the New Orleans Pacific as "the assignee" of the Backbone Company. These are words of mere identification, and were not intended to declare that the New Orleans Pacific took the lands subject to any liens which the Backbone Company might have attempted to create thereon. How can it be supposed that Congress intended to validate or recognize liens created by the old defunct company, which had not even attempted to earn the lands, at the expense of the New Orleans Pacific Company, which built the road and thereby earned the lands?

The title of the United States at the time of the passage of the Act of February 8, 1887, was not subject to any lien attempted to be created by the Backbone Company, and the whole scope and purpose of the Act of 1887 show that it was not intended to recognize any rights in the Backbone Company or its creditors with respect of these lands, since the provisions in favor of settlers, above referred to, are inconsistent with any such view, and since it grants and confirms to the New Orleans Pacific the title of the United States and

of the original grantee. The New Orleans Pacific Company's title rests both on the words of *confirmation* based upon its equity arising out of having earned the lands and upon the distinct *grant* to it made by the Act of 1887.

There can be no doubt that this act vested the *title* to these lands in the New Orleans Pacific. These lands could have been subjected to the old mortgage of 1870 only in one of two ways:

FIRST. Either by reason of some personal agreement of the New Orleans Pacific Company, such as its being the corporate successor of the Backbone Company. It was not such successor, but was a new and independent company, and never made any contract by which it agreed to assume the obligations of the old Backbone Company in respect of these lands. The deed or assignment of the Backbone Company to the New Orleans Pacific of January 5, 1881, appears in the record at page 43. It is simply a quitclaim of all right, title and interest of, in and to a certain grant of public lands by Act of Congress of March 3, 1871. It contains no covenant of any description whatever.

SECOND. The only other way in which these lands could have been subjected to the lien of the

mortgage of 1870 would have been by reason of the title having been in the Backbone Company and having thus become subject to the mortgage as after-acquired property. But, as we have seen, the title never vested in the Backbone Company, and consequently was not in this way made subject to the mortgage.

WE SUBMIT THAT THE ONLY WAY IN WHICH THE PURPOSE OF CONGRESS in the passage of the Act of February 8, 1887, can be carried out is to treat it as practically a forfeiture of all rights of the Backbone Company and a regranting of the lands to the New Orleans Pacific subject to the rights of settlers. In no other way can the settlers be protected; and if the settlers stand free from any attempted hypothecation of the Backbone Company, so equally does the New Orleans Pacific. The two titles necessarily stand or fall together.

In this connection we insist upon the following principle as applicable to the case and conclusive in the appellant's favor:

The patent of March 3, 1885, and the Act of February 8, 1887, at the very least, vested the full LEGAL TITLE to the lands so patented in the New Orleans Pacific Railway Company, and its equities arising

out of its construction of the railroad, and the equities of its bondholders, who furnished the means of construction, of which the defendants Dillon and Alexander are the mortgage trustees, are superior to any equities of the bondholders under the old mortgage of October 1, 1870, made by the Backbone Company.

The defendants, the New Orleans Pacific Company and Dillon and Alexander, having the *legal* title, they are entitled to be protected as against any equities which are inferior to theirs. This is so upon the general and familiar principles of equity. But, besides, the whole scope of the Act of Congress of February 8th, 1887, shows that Congress acted upon this principle and intended to apply it to the case in hand.

But it may be urged that the New Orleans Pacific HAD NOTICE OF THE MORTGAGE OF 1870 by reason of its alleged recordation, and hence took the title to the patented lands from the United States subject to such mortgage. Sufficient answer to this has already been given, viz.: that the mortgage of 1870 never was any lien upon lands patented to the New Orleans Pacific Company.

But we go further, and insist that *the doctrine of notice has no application*:

(A) The title of the United States was not subject to the alleged mortgage lien, and the United States granted all of its title to the New Orleans Pacific. It, therefore, holds the same title that the United States held. The case, in this view, comes within the principle of the familiar rule that, even if one has notice of a prior lien or equity, he may resist its enforcement under cover of want of notice in his immediate vendor.

Fletcher vs. Peck, 6 Cranch, 87.
Bassett vs. Nosworthy, 2 Lead. Cases Eq., 33 (4 Am. Ed).

(B) Lord HARDWICKE, in Le Neve vs. Le Neve, 2 Lead. Cas. Eq. (4 Am. Ed.), 35, thus states the doctrine:

"A person who purchases an estate (although for a valuable consideration), after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest. Fraud or *mala fides* is the true ground on which the Court is governed in cases of notice."

What fraud or *mala fides* exists in the New Orleans Pacific in taking the patent or availing

itself of the confirmation of its title by the Act of 1887 (Sec. 6), or of the grant of the lands newly made to it by that Act (Sec. 3.)?

THIRD PROPOSITION.

The final decrees in this case are not only anomalous and grotesque, but fatally erroneous.

The rule of law is well settled by the numerous decisions of this Court and of other Courts, as it is stated in Jones on Corporate Bonds and Mortgages, 2d Ed., Section 388, as follows:

"Ordinarily a bondholder secured by a mortgage to trustees is not allowed to sue the corporation with respect to any matter within the trust, except when it appears that the trustees refuse or neglect to act, or they stand in a hostile position, or have assumed a position prejudicial to the interests of the bondholders, or there is a vacancy in the office. Such neglect, refusal or vacancy he must allege and prove" (see cases cited in the notes).

In the present case it was not alleged or proved by the complainant Parker that the trustee under the mortgage securing his bonds had been re-

quested to act or had refused to act, but the trustee was made a party defendant without such allegation or proof.

The appellee will not contest this general principle, but may rely upon a provision in the act of mortgage, found on page 13 of the record, as follows:

"That should the said company at any time be in default in paying the aforesaid bonds or coupons of interest, or any part or portion thereof, the holder or holders of such bonds or coupons shall have the right, without further delay, to institute legal proceedings for the recovery of his or their claim, and for the foreclosure of this mortgage, in any court of competent jurisdiction."

This affirmative or declaratory provision gives no right or remedy to the holder of bonds and coupons which he would not otherwise possess. Without any such provision he would have a right to sue his debtor at law and recover a judgment *in personam*. Without any such provision he would have a right to go into a court of competent jurisdiction for the *foreclosure* of his mortgage. But he must assert both of these rights in the usual way; and if he goes into a court of equity for a foreclosure, he must go there according to the principles and under the conditions

which obtain in a court of equity. The trustee must have refused or neglected to act. The appellee seems to have supposed that he could disregard the provisions of the mortgage and file a bill, not to foreclose it on all the property mortgaged, but to omit the railroad and appurtenant property which was mortgaged (and, as we claim, the only thing mortgaged), and go exclusively for lands which were embraced in the subsequent grant which was not mortgaged, and on which the mortgage to Dillon and Alexander rested, and sell the same without reference to the railroad. And he took a decree accordingly, and a decree for his exclusive benefit, and not for the benefit of all co-bondholders. This is not a foreclosure of the mortgage, and these objections to the decree will be now considered, wherein it will be shown that it would be inequitable to put such a construction on the above clause in the mortgage on which the appellees rely as would give to any separate bondholder the right to a decree to seize and appropriate for himself the exclusive benefit of the security, or any part of it. Such was the nature and effect of the twin decrees in favor of Parker and Hamlin.

The Twin Decrees are Absurd and Inequitable.

The separate decree of the Court below in favor of the complainant Parker, as well as the separate decree in favor of the complainant Walter A. Hamlin, are each and both of them erroneous in that they attempt, by their terms, to appropriate to the sole benefit respectively of the said Parker and the said Hamlin the entire mortgaged property. It is well settled that a holder of part of the bonds secured by a mortgage of property has no right to appropriate to his sole benefit the property mortgaged to secure all the bonds.

The reason of this rule is clear: The bondholders have a common interest in the security and are all equally entitled to the benefit of it. This is so declared in the mortgage of October 1, 1870 (Record, p. 12). For this reason a court of equity always requires that the premises, if sold at all, be sold for the benefit of the holders of all the bonds, and not for the benefit of any single holder. It is only in this way that a distribution can be made among the holders of all the bonds *pro rata*, to which distribution they are entitled by the mort-

gage. The decree in the present case in favor of the complainant Parker directs that the lands assumed to be comprised in the mortgaged premises be sold "free and clear of all encumbrances" to pay his bonds, and similarly the decree in favor of the complainant Hamlin directs that the same lands be sold "free and clear of all encumbrances" to pay his bonds. Such sales are clearly impossible in the very nature of things. They are contradictory on their face; for, if the lands be sold free and clear of all encumbrances in order to pay the complainant Parker's bonds, then the purchaser would have a clear title, and the complainant Hamlin would have no right to sell the same lands for the payment of his bonds. Such decrees are manifestly absurd. There should have been, if any, a single decree directing the sale of the whole mortgaged security for the purpose of the payment of *all* the bonds, not only the complainant Parker's and Hamlin's, but all other bonds entitled to the benefit of the mortgage security. This is the method and only method ever pursued by a court of equity in a foreclosure sale. The authorities on this point are conclusive. The rule is accurately stated in Jones on Corporate Bonds and Mortgages, Second Edition, Section 392:

"A holder of part of the bonds, secured by a mortgage of property insufficient to satisfy the entire mortgage debt, has no right to appropriate to his sole benefit by execution and sale the property mortgaged to secure all the bonds. The bondholders have a common interest in the security, and are all equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt, a distribution must be made in equity among all the holders of bonds *pro rata*. To permit a bondholder to proceed at law for the collection of a part of the mortgage debt by execution against the mortgaged property would prevent a *pro rata* distribution in case of a deficiency, and would give him an inequitable preference over his fellow-bondholders."

So also the same learned author states (Sec. 393):

"A single bondholder cannot reach the property conveyed to the trustee by a suit to enforce his individual claim. The remedy against the property conveyed to the trustee is through him, or through a bondholder acting for all the bondholders. As to other property of the corporation not conveyed to the trustee, the bondholder has the same right as any individual creditor to levy upon it. His execution cannot be levied upon property not actually owned by the company, but conveyed to trustees by a mortgage duly recorded. If he levies upon and sells the mortgaged property and franchises of the corporation under a judgment for the principal or interest of his

bonds, the purchaser acquires no title to such property and franchises."

Most of the cases cited in the notes to these sections above quoted are cases where the holder of a bond has attempted by obtaining a judgment and execution at law to sell the mortgaged premises for his own benefit in order thus to gain a priority over the other bondholders; but the courts of equity have always held that he cannot in this way, by a judgment and execution at law, or in any other way, gain such priority in the premises. *A fortiori* a court of equity will not make its own decree directing the sale of the property free and clear of all encumbrances to pay the bonds of a single bondholder to the exclusion of all others. It will not suffer a court of law to accomplish such a result; much less will it do the same thing itself.

This Court has directly passed upon this question in the case of *Pennock vs. Coe*, 23 How., 117. In that case the defendants Pennock and Hart, being the holders of sixteen of the bonds issued under the second mortgage, recovered a judgment on the same against the railroad company, issued execution and levied on a portion of the rolling stock of the road and caused the same to be adver-

tised for sale. The bill was filed by Coe, the trustee, under the mortgage to enjoin the sale, and a decree was rendered perpetually enjoining it in the Court below, which decree was before this Court on appeal. Mr. Justice NELSON, giving the opinion of this Court, said (p. 131):

"In the second place, the judgment sought to be enforced by the defendants was recovered upon bonds of the second issue, and secured, in common with all the bonds of that issue, upon this property, by virtue of the second mortgage. These bondholders have a common interest in this security, and are all equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt in equity, a distribution is made among the holders *pro rata*. The payment of the bonds of the second issue is also postponed until satisfaction of the issue comprehended within the first mortgage, as the second was taken with a full knowledge of the first. To permit, therefore, one of the bondholders under the second mortgage to proceed at law in the collection of his debt upon execution would not only disturb the *pro rata* distribution in case of a deficiency, and give him an inequitable preference over his associates, but also have the effect to prejudice the superior equity of the bondholders under the first mortgage, which possesses the prior lien."

FOURTH PROPOSITION.

From the fact that the suit to foreclose the mortgage is a unit, being brought by the complainants on behalf of themselves and all other bondholders, in which is adjudged and decreed the validity of the whole mortgage security, it follows that the value of the matter in controversy is not the value of the bonds of the complainant Parker, but the value of the whole mortgage security.

It is, as above shown, the settled rule of law that a sale made in a suit by the holder of part of the bonds in behalf of himself and other holders to foreclose the mortgage securing the bonds must be made for the benefit of all the bondholders. It is also settled that in such a suit all the bondholders have the right to come in under the decree and take the benefit of it, even if they are not made parties to the suit. A decree in such a suit, even if the holders of only part of the bonds are plaintiffs (provided the other necessary parties are before the Court, which, for the present argument, must be assumed to be the case), establishes the validity of the mortgage as respects all the bonds. The decrees in the present case expressly adjudge the validity of

the whole mortgage security. Any other holders of the bonds might not only have come in under the decree and obtained the benefit of it as respects his bonds, but he may also treat the decree as *res judicata* for all other purposes. As against the mortgagor company, and as against all other incumbrancers who, as parties to such suit, the matter involved and decided, namely, the validity and lien of the mortgage, is *res judicata*, and the decree adjudging it to be such is final and binding upon such mortgagor and such other incumbrancers. Not only so, but it also binds other bondholders (see Shaw vs. Railroad Co., 100 U. S., 605, 611). They cannot thereafter open such issue and re-try the question of the validity or lien of the mortgage. For these reasons, therefore, a suit by one bondholder on behalf of himself and other bondholders is a unit in which is drawn in question *the whole mortgage security.* The decree in favor of the bondholders in such a suit establishes *the validity of the whole mortgage security; and the value of the matter in controversy is the value of the whole mortgage security.*

All the above is true, even if there be only one bondholder suing on behalf of himself and all others and the others be not made co-complain-

ants. But, further, in the present case the complainant Hamlin was expressly a co-complainant in this suit, and thus by name became a party to the suit, and as such co-complainant was entitled to share in the conduct of the suit. The suit to foreclose the mortgage was not two separate suits by Parker and Hamlin respectively, but one suit; and the value of the matter in controversy, even if we consider only the bonds of the nominal plaintiffs, exceeds $5,000, while the correct rule, as we have shown above, is that the value in controversy is the value of the whole mortgage security.

See Marshall vs. Holmes, decided by this Court at this term, opinion by HARLAN, J. Here the cases of Parker and Hamlin were "tried as one case," as they were in Marshall vs. Holmes.

THE OTHER QUESTIONS arising in the case as to the dismissal of the cross-bill, the necessity of reinscription of the plaintiff's mortgage, &c., I leave on the discussion thereof in the brief already filed.

JOHN F. DILLON,
For the Appellants.

Dec. 30, '91—50.

Office Supreme Court U.S.
FILED.
DEC 7 1891
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

No. 137 of October Term, 1891.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY AND JOHN F. DILLON AND HENRY M. ALEXANDER,

TRUSTEES, APPELLANTS,

versus

JOHN D. PARKER ET ALS., APPELLEES.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

BRIEF ON BEHALF OF APPELLANTS, ON MOTION OF APPELLEE PARKER TO DISMISS APPEAL AS TO HIMSELF ONLY.

WILLIAM WIRT HOWE,
JOHN F. DILLON, and
WAGER SWAYNE.
Of Counsel for Respondents, Appellants.

DEC., 1891.

T. H. Thomason, Printer, 33 Natchez St.

SUPREME COURT OF THE UNITED STATES.

No. 137 of October Term, 1891.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY AND JOHN F. DILLON AND HENRY M. ALEXANDER,

TRUSTEES, APPELLANTS,

versus

JOHN D. PARKER ET ALS., APPELLEES.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

BRIEF ON BEHALF OF APPELLANTS, ON MOTION OF APPELLEE PARKER TO DISMISS APPEAL AS TO HIMSELF ONLY.

The complainant, John D. Parker, one of the appellees, filed his bill in the lower court, February 15th, 1886, on behalf of himself and all persons similarly situated, against the New Orleans, Baton Rouge and Vicksburg Railroad Company, the Union Trust Company of New York, the New Orleans Pacific Railway Company, against John F. Dillon and Henry M. Alexander, who are trustees in the land grant mortgages of the New Orleans Pacific Railway Company, and against Samuel D. McEnery, who was Governor of Louisiana.

The bill sets forth the incorporation of the New Orleans, Baton Rouge and Vicksburg Railroad Company by the Act of the General Assembly of Louisiana, No. 143 of 1869, which was approved December 30th, 1869, and will be found bound up in the Acts of 1870 at page 7. The bill avers that under that Act the said New Orleans, Baton Rouge and Vicksburg Railroad Company was authorized to make and issue its first mortgage bonds, such bonds and the mortgage securing the same to be a prior lien to the extent of $12,500 a mile, payable in coin or currency, or 2500 pounds sterling, bearing interest, not to exceed 8 per cent. per annum, payable semi-annually, upon each and every mile of the *branch and connecting railroads* within the State of Louisiana, including the right of way, road bed, the rails, depots, buildings, stations, shops, machinery, tools, engines, cars and real and personal estate within the State of Louisiana *appurtenant to or necessary for the operation of* said line of railroad and its branch and connecting *roads*, owned by the Company at the date of said mortgage, or which may be acquired by it thereafter and of the franchises and privileges of said Company." The bill proceeds to allege the organization of the Company, a location of certain lines from New Orleans to Baton Rouge and from Baton Rouge to Shreveport, the making of $6,250,000 of bonds, of which sum $1,500,000 are alleged to have been issued *and $500,000 to be outstanding*, and the execution of a mortgage to secure these bonds in favor of the Union Trust Company. It is averred that Thomas C. Bates, acting and under and by virtue of resolutions of the Board of Directors of said Company on the first day of *October, 1870*, mortgaged and hypothecated to the Union Trust Company, aforesaid, for the benefit of whomsoever should from time to time hold the aforesaid bonds or coupons or any one or more of the same, certain property, which is described in the

bill and in its Exhibit A as follows—(Transcript pp. 4 to 12. We copy from the bill):

"The whole of the main line of railroad and its branches and connecting lines, including a *branch line* commencing at the City of Baton Rouge and extending thence through the Parishes of West Baton Rouge, Iberville, Pointe Coupee, St. Landry, Avoyelles, Rapides, by way of Alexandria, Natchitoches and De Soto to Shreveport, and also a branch road commencing on the main line of said road in the Parish of East Baton Rouge, and extending through the Parishes of Ascension, St. James, St. John the Baptist, St. Charles and Jefferson, to the Mississippi River at the City of New Orleans, together with all the rights of way, road-bed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, tenders and other rolling stock, also all real and personal estate within the State of Louisiana owned by said Company at the date of the mortgage, or which may be acquired by it thereafter, appurtenant to or necessary for the operation of said main line of said railroad, or any of said branches connected with said main line, or to be connected therewith. Also all other property, real and personal, of every kind and description whatsoever, and wheresoever situated, in the State of Louisiana, which is now owned, or which shall hereafter be acquired by the said company, *and which* shall be appurtenant to or necessary or used for the operation of said main line of railroad or any of said branches. Also, all the tenements, hereditaments and appurtenances, *thereunto belonging*, and all of the estate, right, title and interest, legal and equitable, of the said Company and its successors and assigns *therein*, together with the corporate franchises and privileges of said Company, at any time granted, or to be granted, by the State of Louisiana, relative to the construction, operation or use of said railroad within said State."

The bill further avers (p. 5) that, under the terms of the mort-

gage, any holder of bonds or coupons may foreclose, and also avers that the mortgage was duly recorded as required by the laws of Louisiana in the parishes of Orleans, Jefferson, St. Charles, St. John the Baptist, St. James, Ascension, Iberville, West Baton Rouge, St. Landry, Avoyelles, Rapides, Natchitoches, Sabine, Vernon, De Soto, Caddo, Bossier, Webster, Claiborne, Bienville, Red River, Winn, Catahoula and Calcasieu.

The bill then sets forth (p. 6) the land grant made in favor of the New Orleans, Baton Rouge and Vicksburg Railroad Company by the 22d Section of the Act of Congress of March 3d, 1871, being the original Act to incorporate the Texas and Pacific Railroad Co. By this section it appears that there was granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, the same number of sections per mile of lands of the United States in Louisiana as were granted to the Texas and Pacific Railroad Company in California, namely, ten sections per mile on each side of the line, with a provision in regard to indemnity limits. It may be noted in passing, that this Act of Congress provided that the lands so granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company should be withdrawn from market, selected, and patents issued therefor and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California; and that under the 12th section of the said Act of March 3d, 1871, lands are only to be patented upon the *completion* of the first and each succeeding section of twenty-five consecutive miles of *railroad put in running order*.

The bill further refers (p. 7) to an Act of the Legislature of Louisiana of 1872, No. 100, bound up in the Acts of 1873, p. 29, which is averred to confer on the New Orleans,

Baton Rouge and Vicksburg Railroad Company the right to build a road from *New Orleans to Shreveport.* The Act is made part of the bill and will be referred to hereafter in considering the points in this case.

The bill then avers that the grant of lands by the 22d section of the said Act of Congress of 1877, was a present grant and vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company the granted lands, and they therefore became immediately subject to the mortgage above recited of October, 1870. It further states (p. 7), that on or about November 11th, A. D. 1871, the said New Orleans, Baton Rouge and Vicksburg Railroad Company filed in the General Land Office of the United States a map designating the *general route* of its road from Shreveport, by way of Alexandria, to Baton Rouge, and thereupon the withdrawal of the public lands upon the same was ordered in accordance with the provisions of the Act of Congress aforesaid. A map purporting to be this delineation of a *general* route is found in the transcript between pp. 14 and 15. The complainant avers that on the faith of the grant he has acquired two of these first mortgage bonds of 1870 with coupons attached, which he makes part of his bill. The bonds are not yet due, but it is averred that thirty of the coupons are due. In other words, no coupons were ever paid.

The bill further avers (p. 7), that on or about the 5th day of January, A. D. 1880 (the year should be 1881, Rec. p. 7), the said New Orleans, Baton Rouge and Vicksburg Railroad Company sold, transferred, assigned and delivered to the New Orleans Pacific Railway Company, all of the right, title and interest in and to the lands so as aforesaid vested in said New Orleans, Baton Rouge and Vicksburg Railroad Company, but that said act of mortgage having been as aforesaid *duly recorded* anterior to the date of said transfer, and anterior to the date of any

registry or record of said transfer, the said sale and transfer was made subject to the mortgage, and the lands sold and transferred were acquired by the New Orleans Pacific Railway Company subject to said mortgage.

The bill further avers that on or about the 3d of March, A. D. 1885, patents of the United States for 679,287 64-100 acres were issued under the authority of the Act of Congress aforesaid to the *New Orleans Pacific Railway Company*, as assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, which lands were averred to constitute a portion of those granted to and vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company; that they were and are subject to the mortgage aforesaid of 1870, and that to enforce payment of the amount of the coupons so due complainant, he is entitled to have the said mortgage foreclosed and to have said lands sold according to law. He avers that said lands are situated in the Parishes of De Soto, Sabine, Natchitoches, Vernon, Rapides, Avoyelles, St. Landry, Calcasieu, Catahoula, Winn, Red River, Bienville and Bossier, in the State of Louisiana, and in the Western District of Louisiana, and that the Court has jurisdiction over the matters presented. He annexes certain certified lists of said lands, the printing of which, in the transcript, has been dispensed with by stipulations of all parties appearing in the cause.

The bill further avers that the said New Orleans, Baton Rouge and Vicksburg Railroad Company had not at the time the bill was filed any office at its legal domicile in the City of New Orleans or elsewhere, and that the company was wholly insolvent. It appears that this Company has never paid any of the coupons on said bonds of 1870. It is not averred in the bill that the New Orleans, Baton Rouge and Vicksburg Railroad Company ever definitely located a railroad of any sort, or ever filed a map of

definite location in the Department of the Interior, or ever built any road at all, and the fact appears in evidence, as will be noted hereafter, that it never did build any railroad of any kind, description or length whatever.

The bill further avers (p. 9), that on the 28th of December, A. D. 1870, Thomas C. Bates, then President and assuming to act for the New Orleans, Baton Rouge and Vicksburg Railroad Company, made and executed a mortgage in favor of the Governor of the State of Louisiana, as trustee, to secure the payment of 6,250 Second Mortgage Bonds, each for $1,000, with interest coupons attached, which said mortgage embraced the same property described and specified in the mortgage given by said Company to secure its first mortgage bonds (of October 1st, 1870) but the bill avers that said second mortgage was subsequent and subordinate to said first mortgage, and that said Company never issued any of said second mortgage bonds and that the mortgage given to secure same has been *erased, cancelled and extinguished.* Samuel D. McEnery, who was Governor of Louisiana at the time the bill was filed, seems to have been made a nominal defendant with reference to this mortgage. It is further averred (p. 9), that on the 4th September, A. D. 1872, Calvin H. Allen, assuming to act as President of and for the said New Orleans, Baton Rouge and Vicksburg Railway Company, executed a mortgage in favor of the Union Trust Company of New York, on the same property so as aforesaid mortgaged to secure payment of its first mortgage bonds and coupons, which said mortgage of September 4th, 1872, was executed to secure payment of 12,000 bonds each for $1000, with coupons for interest attached, styled, First Mortgage, Seven Per Cent. *Land Grant* and Sinking Fund Gold Bonds, but it is averred that said mortgage was subsequent and subordinate to said first mortgage; that said Company never issued any of its said First Mortgage, Seven Per Cent.

Land Grant or Sinking Fund Gold Bonds, and that if any of same are now outstanding they are not and never were valid obligations of said Company.

The bill then avers (p. 9) that by acts of mortgage bearing date April 17th, 1883, and January 5th, 1884, the New Orleans Pacific Railway Company made and executed in favor of John F. Dillon and Henry M. Alexander, of the city of New York, trustees, a *Land Grant* and Sinking Fund Mortgage on all the lands acquired by said Company from the New Orleans, Baton Rouge and Vicksburg Railroad Company to secure the payment of Land Grant and Sinking Fund Bonds, limited to an issue of $2.50 per acre on the number of acres of said land, and the bill goes on to aver that said mortgage in favor of Dillon and Alexander is subsequent and subordinate to the mortgage so as aforesaid given and executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company to secure the payment of its first mortgage bonds and coupons (meaning the mortgage of October 1, 1870).

The bill then goes on to state that the Union Trust Company of New York, John F. Dillon, Henry M. Alexander and S. D. McEnery are not inhabitants of the said Western District of Louisiana, and that complainant is entitled to have said parties compelled to answer by service, by publication, or by both. The bill then asks for "judgment against the New Orleans, Baton Rouge and Vicksburg Railroad Company for the amount of said coupons so as aforesaid due and alleged to be held by the complainant, and that the said lands hereinbefore described be held subject to the mortgage to secure the payment of said bonds and coupons as hereinbefore set forth and that said mortgage be recognized and enforced, and that said lands be sold to pay and satisfy the amounts due to complainant." And the bill then prays for process, for publication, etc.

A copy of the act of mortgage sued upon is found at pp. 11 to 14, and at pages 16 to 17 are certain orders from the Land Department dated November 29th, 1871. At pp. 18 to 19 is found a copy and sample of one of the bonds sued upon. It will be noticed, by reference to p. 18, tenth line from the bottom, that the words "by act of Congress" seem to have been inserted in the bond, *but there are no such words in the description in the act of mortgage.*

None of the defendants named in the bill ever appeared in the case, except the New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, trustees of the Land Grant Mortgages of New Orleans Pacific Railway Company. These parties filed their general demurrer, June 30th, 1886, found at pp. 28 and 29, which was duly argued and overruled in September, 1886 (p. 30). "Judgment *pro confesso*" appears to have been entered August 4th, 1886, against the New Orleans, Baton Rouge and Vicksburg Railroad Company, Union Trust Company of New York, and S. D. McEnery, Governor of Louisiana. The demurrer having been overruled, as above stated, in September, 1886, the answer of the New Orleans Pacific Railroad Company and of John F. Dillon and Henry M. Alexander, trustees, was filed October 2d, 1886, pp. 31 to 38. It admits the incorporation of the New Orleans, Baton Rouge and Vicksburg Railroad Company by the Act of 1869, refers to that Act for the enumeration of the powers of that corporation and does not admit the averments in the bill of complaint in that behalf, except so far as said averments truly state the powers conferred by said act of incorporation. The respondents aver that by that act of incorporation it is provided that the said First Mortgage bonds and the mortgage securing the same contemplated by said act should be a lien only to the extent of $12,500 per mile upon each and every mile of the aforesaid main line and branches of

said railroad within the State of Louisiana, including the right of way, road bed, rails, depots, stations, shops, machinery, tools, engines, cars and all real and personal estate within the State of Louisiana, *appurtenant to or necessary for the operation of* said main line and branches of railroad owned by the Company at the date of the said mortgage, or which might be acquired by it thereafter, and all the corporate franchises and privileges of the said Company granted by the State of Louisiana, relative to the *construction, operation and use* of said railroad within the State of Louisiana, and the respondents aver that the power thus given and limited to make and execute the said first mortgage did not authorize the execution of any mortgage which should cover or embrace any lands which might thereafter be acquired by said Company by virtue of any grant of Congress to that effect, except so far, if at all, as if said lands should be actually used and occupied by said railroad for its track and for the actual operation of trains, and for stations and depot grounds. They deny that the said instrument of mortgage set out in the bill of complaint or therein referred to, dated the first day of October, 1870, either *did or legally could* embrace the 679,287 64-100 acres of land or any part thereof, which were, on or about the 3d day of March, 1885, patented by the United States to the New Orleans Pacific Railway Company, or the lands or any part thereof which, by the 22d Section of the Act of Congress of March 3d, 1871, were granted, as in said Act provided, to the New Orleans, Baton Rouge and Vicksburg Railroad Company. The respondents aver that they have no knowledge or information sufficient to form a belief, and therefore deny that on the first day of October, 1870, or at any other time, the New Orleans, Baton Rouge and Vicksburg Railroad Company authorized by due corporate resolution or otherwise the execution of the bonds mentioned in the bill of complaint, to-wit., bonds for $1,000 each,

bearing date 1870 and payable on the first day of October, 1910, with coupons thereto attached, and with recitals specified and contained in said bill of complaint, or in like manner or in any manner, authorize the execution of the said alleged mortgage of October 1, 1870, to the Union Trust Company of New York, to secure the said bonds and coupons, and defendants *require strict proof of said allegations*, and each of them contained in said bill of complaint. They especially deny that the said corporation ever authorized the mortgaging of any land grant, and the lands thereof by the act or instrument of October 1, 1870, set up in the bill. They make other allegations at p. 32, asking for strict proof of the authorization and execution of said mortgage of 1870. They also require strict proof of its *recordation* according to law, and they aver that if it was duly recorded it has never been *reinscribed* as required by the laws of Louisiana within ten years next succeeding its original registry in any of said parishes, nor until after said mortgage mentioned in the bill of complaint executed by the New Orleans Pacific Railway Company to Dillon and Alexander, trustees, has been duly executed and recorded according to the requirements of the laws of the State of Louisiana in that behalf. They specially deny that the New Orleans, Baton Rouge and Vicksburg Railroad Company, by the said act of mortgage of October 1, 1870, mortgaged and hypothecated, or could legally do so, to any future holder or holders of the said bonds or coupons or any part of the same, all the property and rights of any kind owned by said company at the date of said mortgage, or which it might thereafter acquire. They deny that if the said mortgage of 1870 was executed as alleged, or recorded as alleged, the said New Orleans, Baton Rouge and Vicksburg Railroad Company could not sell, assign, transfer or encumber said property so described, or any part thereof, and especially deny that it could not sell,

assign or transfer any rights which it acquired under and by virtue of the 22d Section of said Act of Congress of March 3, 1871, except subject to said mortgage as alleged in the bill of complaint in that behalf. They also traverse the allegations of the bill as to the execution and signature of the bonds and coupons and the making and the execution of the mortgage, and the adoption of resolutions such as are alleged in the Bill of Complaint to have been adopted by the Board of said New Orleans, Baton Rouge and Vicksburg Railroad Company, or the company itself, and whether the said company did place the said bonds on the market or offer the same for sale, or disposed of any part thereof for a valuable consideration. They admit the passage of the Act of the Legislature of Louisiana of December 11th, 1872, being No. 100 of the Session of 1872, referred to in the bill, and they refer to that Act for a fuller statement of its provisions, and they say that said Act referred to the land grant made by the 22d Section of the said Act of Congress of March 3d, 1872, and provided for the giving up of the scheme of second mortgage bonds to be granted by the said Company as contemplated by the Act of 1869, incorporating the New Orleans, Baton Rouge and Vicksburg Railroad Company, and authorized first mortgage bonds to be issued by said Company at the rate of $30,000 per mile to be a first lien on the real and personal property and all lands acquired by the Act of Congress or otherwise, and they aver that said Act exhibits the understanding alike of the New Orleans, Baton Rouge and Vicksburg Railroad Company and the Legislature of Louisiana, that no mortgage on said lands was ever contemplated or authorized by said Act of 1869, incorporating the said Company, or was ever established by said Act of mortgage of October 1, 1870. Defendants admit the passage of the Act of Congress of May 2d, 1872, but refer to the said Act for greater certainty as to its provisions and effect.

They deny that the grant made by the Act of Congress of March 3d, 1871, particularly by the 22d Section thereof, was a present grant in such sense as to vest in the New Orleans, Baton Rouge and Vicksburg Railroad Company title to the lands granted without further acts to be done by the grantee or its assigns as hereinafter set forth, and deny that said lands became and were immediately subject to the said alleged mortgage of 1870. They have been informed that on or about November 11, 1871, the New Orleans, Baton Rouge and Vicksburg Railroad Company filed some map of the *general route* of its road in the General Land Office at Washington, but of the time when and particulars of which they are not advised and require proof thereof; but they aver that said railroad company never filed in the Department of the Interior at any time, any map of *definite location* of the line of their said railroad or any part thereof, or any map of definite location whatever, and they aver that said Company never made any *definite* location of its line of railroad, or any part thereof, or ever built or constructed any part of its authorized line of railroad. Respondents aver that they have no knowledge or information sufficient to form a belief and therefore deny that on the faith of said Acts of Louisiana and of the said Acts of Congress, and of the action taken thereon with respect to said bonds and mortgage, the plaintiff has, in good faith and for a valuable consideration, acquired, and now holds two of said bonds and coupons thereto attached, as alleged in the bill of complaint. The respondents admit that on or about the 5th day of January, 1881, and not on the 5th day of January, 1880, as alleged in the bill of complaint, said New Orleans, Baton Rouge and Vicksburg Railroad Company executed to the defendant, the New Orleans Pacific Railway Company, in due form, a deed of conveyance, granting and conveying to the said last mentioned railway company all the right, title and interest of the

said New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, in and to a certain grant of public lands granted to the said Company by an Act of Congress of the United States, approved March 3, 1871, which said conveyance was duly executed by said grantor Company, and received and accepted by the grantee Company, and was subseqently duly ratified by the stockholders of the said grantor Company. They deny that said sale and transfer to the New Orleans Pacific Railway Company was made subject to the said alleged mortgage of October 1, 1870, and that said lands sold and transferred were acquired by said New Orleans Pacific Railway Company, subject to said mortgage. The respondents then proceed to show that the New Orleans Pacific Railway Company was incorporated in February, 1876 (Act No. 14 of 1876 and amendments thereto) to construct a railroad from the City of New Orleans through the State of Louisiana to a connection with the Texas and Pacific Railroad at Shreveport. That prior to 1880 the New Orleans Pacific Railway Company had built and graded but a small part of its road, and the New Orleans, Baton Rouge and Vicksburg Railroad Company had never graded or built any portion of its road, and was unable to do so; that in 1880, the New Orleans Pacific Railroad Company found that it would be enabled to raise means to construct its road provided it should be able to acquire any existing right which the New Orleans, Baton Rouge and Vicksburg Railroad Company would have under the 22d Section of the Act of Congress of March 3, 1871; that the said deed of January 5th, 1881, was executed in pursuance of contracts previously made therefor, and the Department of the Interior was notified of said transfer to the New Orleans Pacific Railway Company; that on the 21st February, 1881, the Commissioner of the General Land Office recognized the transfer to the New Orleans Pacific Railway Company to be complete, on the faith of which the

said New Orleans Pacific Railway Company proceeded with the construction of said road as required by the Act of Congress of the United States, and on the 27th October, 1881, duly filed in the Department of the Interior a map of the *definite* location of a part of its road, and on the 17th of November, 1882, likewise duly filed with the Department of the Interior a map of *definite* location of the rest of its road between New Orleans and Shreveport in all respects as required by the Act of Congress. That commissioners were appointed by the Secretary of the Interior to examine the road so contructed by the New Orleans Pacific Railway Company, who reported that the same had been constructed in full compliance with the Acts of Congress in that behalf, which reports were laid before the Secretary of the Interior, and on March 13th, 1883, that officer found and decided that the New Orleans Pacific Railroad Company had the right to receive the lands under the 22d Section of said Act, and that patents for such lands as might have been earned by the said Company should be issued to it, which finding and decision was laid before the President of the United States, who on the 16th day of March, 1883, as authorized by and conformably to the said Act of Congress of March 3, 1871, endorsed the same: "This recommendation approved. Chester A. Arthur." The respondents admit that by reason of the said construction of said road by the said New Orleans Pacific Railway Company, whereby it earned said lands, on or about the 3d March, 1885, patents of the United States for about 679 287 64-100 acres of lands were, under the orders of the Secretary of the Interior and of the President of the United States, issued to the said New Orleans Pacific Railway Company. Defendants aver that the said New Orleans, Baton Rouge and Vicksburg Company never at any time filed any map of *definite* location of the line of its road or any part thereof; that the maps filed as aforesaid by

the New Orleans Pacific Railway Company on the 27th October, 1881, and the 17th November, 1882, were the first and only maps of definite location of said road ever filed in the Department of the Interior; that as they are advised, the legal title to all of said lands in place granted by the 22d Section of the Act of March, 1871, remained in the United States at least until the said maps of definite location were filed, if not until the said patents were issued therefor on the 3d day of March, 1885, and as to the indemnity lands the title remained in the United States until they were actually selected, which selections were made by the New Orleans Pacific Railway Company in pursuance of its definite location and the construction of its road, and so these respondents say and aver that the title to no part of the lands so patented ever vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company as alleged in said bill of complaint, or otherwise, nor was any title to it ever recorded in Louisiana, nor did said last named Company ever acquire any equity by reason of the construction of said road or otherwise, to call on the United States to convey to it the title to said lands or any part thereof. And these defendants aver and say that the title to said lands so patented and to all of them, proceeded from the United States *directly* to the New Orleans Pacific Railway Company, and was held by it in its own right absolutely and not as trustee for the New Orleans, Baton Rouge and Vicksburg Railroad Company, or its mortgage bondholders, or the complainant in this suit. These defendants aver that said lands upon which the bill seeks to establish a lien were used by said New Orleans Pacific Railroad Company to enable it to construct its said road, and were used and appropriated in part payment of the cost of constructing same.

Defendants further aver that after the construction of said

road and in order to obtain said patents, the New Orleans Pacific Railway Company was obliged to pay and did pay large expenses for surveying, selecting and conveying of said lands amounting to many thousands of dollars. They traverse the allegation of the bill in regard to the execution on the 28th December, 1870, of an alleged mortgage in favor of the Governor of Louisiana (p. 36); they further state that they believe it is true that on the 4th September, 1872, said New Orleans, Baton Rouge and Vicksburg Railroad Company executed a certain mortgage in favor of the Union Trust Company of New York, but deny that it was on the same property embraced in the mortgage of October 1, 1870; that said mortgage of 1872 was styled, as alleged in the bill of complaint, "a mortgage to secure Seven Per Cent. *Land Grant* and Sinking Fund Gold Bonds," and these defendants, while not admitting the validity of the said mortgage, and not being advised of how many of said bonds are outstanding thereunder, insist that said mortgage shows on its face and by its terms that said Railroad Company had not theretofore made a mortgage on the said land grant by the act of mortgage of October 1, 1870, or otherwise, and that said alleged mortgage of 1872 was the first mortgage which said Company had undertaken to make, pledging or hypothecating said land grant claimed under said Act of Congresss of March 3, 1871. These defendants further admit that by the acts of mortgage dated April 17, 1883, and January 5, 1884, the New Orleans Pacific Railway Company made and executed in favor of the defendants John F. Dillon, and Henry M. Alexander, of the city of New York, as trustees, a land grant and sinking fund mortgage of all the lands acquired by the New Orleans Pacific Railway Company from the United States by virtue of its construction of the said railroad, to secure the payment of its land grant and sinking fund bonds limited to an issue of $2.50 per acre, as will more fully appear by reference

thereto. These defendants deny that the said mortgage in favor of the said Dillon and Alexander is subsequent and subordinate to the alleged mortgage so as aforesaid made and executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company of October 1, 1870. Said Dillon and Alexander further answering say that said bonds issued in pursuance of said acts of mortgage of April, 1883, and January, 1884, are outstanding in the hands of third holders for value, except so far as same have been actually exchanged in pursuance of the provisions of said acts of mortgage for the lands so patented by the United States, March 3, 1885, to the New Orleans Pacific Railway Company; they further show that the legal title to said lands so patented as aforesaid passed from the United States to the New Orleans Pacific Railway Company in the manner hereinbefore shown, and by said acts said lands were mortgaged to the said trustees, Dillon and Alexander, for the benefit of the said trust created in favor of the holders of said bonds executed by the New Orleans Pacific Railway Company, and that by reason of the actual construction of the said road by the New Orleans Pacific Railway Company, whereby these lands were earned by it, and by its means, its rights and equities and those of Dillon and Alexander, trustees, are superior to any right or equity of said complainant, who, if the facts alleged in said complaint are true, which these defendants deny, has for fifteen years slept upon his rights, and during the period when said railroad was being constructed by said New Orleans Pacific Railway Company never set up any claim under said mortgage, nor notified said Company or said trustees of any claim thereunder, and by his laches has disentitled himself to any relief as against said New Orleans Pacific Railway Company, or as against said Dillon and Alexander.

[NOTE: The late clerk of the lower court was a confirmed in-

valid at the time the transcript was made, and soon after died. The documents are not well arranged. Repeated efforts were made to improve the arrangement of the transcript. It will be found to contain, either in itself, or by the stipulation filed, all that is needful for a decision of the case, and we will endeavor to refer to the pages in such a way as not to put the Court to inconvenience.]

On the 13th October, 1886, the said respondents, the New Orleans Pacific Railway Company and Dillon and Alexander, filed their *cross-bill* in the case, which will be found at pp. 78 to 80 of the transcript. The complainant Parker, the New Orleans, Baton Rouge and Vicksburg Railroad Company, the Union Trust Company of New York, and Samuel D. McEnery, who was Governor of Louisiana at the time, were made defendants to this cross-bill. The cross-bill sets forth in the usual form the general tenor of the bill of complaint (pp. 79 to 81). In its second paragraph it gives the history of the New Orleans Pacific Railway Company, its acquisition of the rights of the New Orleans, Baton Rouge and Vicksburg Railroad Company, the grant of public lands made by the Act of Congress of March 3d, 1871, the construction by the New Orleans Pacific Railway Company of its road from New Orleans to Shreveport, its filing of the said maps of definite location, its completion of the road, the examination by the officers of the Government of the United States, their decision that the New Orleans Pacific Railway Company had earned the lands contemplated by the land grant, the issue of the patents to it by the President of the United States for 679,287 64-100 acres of land, and in brief, reiterates all the allegations on this behalf which were made in the answer. They show that said lands upon which the bill of complaints of said Parker seeks to establish a lien for and on behalf of the said 500 bonds alleged by him to be outstanding under the al-

leged mortgage of October 1, 1870, were used by said New Orleans Pacific Railway Company to enable it to construct its said railroad, and were used and appropriated in part payment of the cost of constructing the same, and by the issue of bonds secured by mortgage thereon. They also show that after the construction of the said road, and in order to obtain said patents, the New Orleans, Pacific Railway Company was obliged to, and did pay, large expenses for certifying, selecting and conveying said lands and for taxes thereon amounting to about $40,000. They then set up the acts of mortgage dated April 17th, 1883, and January 5th, 1884, made by the New Orleans Pacific Railway Company in favor of John F. Dillon and Henry M. Alexander; they aver this mortgage to be the first and only lien on said lands and that the bonds, issued at the rate of $2.50 per acre with reference to said lands, are outstanding in the hands of *bona fide* bondholders for value, except so far as they have been exchanged for lands.

They further show that pursuant to the provisions of the said mortgages made by the New Orleans Pacific Railway Company, the cross-complainants are offering the said patented lands for sale under and pursuant to the trust, and are continually embarrassed in and prevented from selling same and from executing the duties of said trust and realizing the true value of said lands by reason of the claims set up by said Parker, complainant in said cause: namely, that said mortgage of October 1, 1870, alleged to have been made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, is a prior lien on said patented lands and the said claim of said Parker on behalf of himself and all other holders of the alleged $500,000 of bonds averred to be outstanding under and by virtue of said mortgage of October 1, 1870, is a cloud on the title of your Orators as patentees and mortgagees and inflicts continual and irreparable injury on them and each of them. That as said mortgage of

October 1, 1870, and the said outstanding bonds secured thereby do not mature for many years, your Orators will continue to be embarrassed and injured thereby irreparably and for this long period of time; that the complaintant Parker sues on behalf of himself and all other holders of bonds issued under said mortgage of 1870,and your Orators are advised and believe that he represents upwards of 200 of said bonds or some association of persons holding that number; that each alleged holder of the 500 bonds averred to be outstanding, other than said Parker, may bring suit similar to his against your Orators and thus involve them in a multiplicity of suits; that a court of equity only can afford a remedy to your Orators and remove and relieve against said cloud, and that your Orators have a right to file this their cross-bill to that end. In the third paragraph of the cross-bill the cross-complainants aver as to said claim of said complainant Parker, namely, that said alleged mortgage of October 1, 1870, is a lien on said lands patented to the New Orleans Pacific Railway Company, and that said lien is prior to that of the mortgage on said lands made by the New Orleans Pacific Railway Company to Dillon and Alexander, trustees, as follows:

(A) The said New Orleans, Baton Rouge and Vicksburg Railroad Company, in October, 1870, had no power to mortgage by said instrument of October 1, 1870, any land grant or lands granted thereby made by the Act of Congress of March 3d, 1871.

(B) Said New Orleans, Baton Rouge and Vicksburg Railroad Company never *authorized* the mortgaging by the instrument or Act of October 1, 1870, of any land grant or lands granted thereby, and especially the land grant under said Act of Congress of March 3d, 1871.

(C) Said mortgage of October 1, 1870, was never recorded and

reinscribed in such way as to preserve the lien claimed by said Parker, even if such lien there was, which is denied.

(D) The said Mortgage of October 1, 1870, does not allude to, describe, include, cover, hypothecate or affect the land grant made by said Act of Congress of March 3, 1871, or the lands granted thereby.

(E) The New Orleans, Baton Rouge and Vicksburg Railroad Company never filed any map of *definite* location, never made any such definite location and never built any road and said lands were finally earned as aforesaid by the location and construction of said road by the New Orleans Pacific Railway Company.

(F) In any event the coupons of the bonds which said Parker claims to hold, so far as they have matured up to and including April 1, 1881, were extinguished by prescription of five years under the laws of Louisiana. (This has been withdrawn.)

(G) The said complainant and his predecessors in title and the other holders for whom he sues have slept upon the alleged rights set up in his bill for fifteen years, and during the time the New Orleans Pacific Railway Company was acquiring said land grant and making definite location of its road and building the same no holder of said bonds issued under the mortgage of 1870, or the trustee of said mortgage, made any claim of lien on the said land grant, or the lands granted, or notified the said New Orleans Pacific Railway Company, nor said Dillon and Alexander, of any said claim, and the said Parker and any other holders of said bonds and their trustee, the Union Trust Company, of New York, have disentitled themselves to any relief in any event as against the New Orleans Pacific Railway Company, the said Dillon and Alexander, the trustees in said mortgage of 1883 and 1884.

They ask for certain orders of publication, etc., and for a decree as against all the other parties to the cause, to remove the cloud

cast upon the title to the said lands by the pretensions with reference to the mortgage of October 1, 1870, and that it be decreed that the said mortgage does not embrace the land grant lands in question in the cause.

On the 27th October, 1886, three of the defendants to the cross-bill, viz: the New Orleans, Baton Rouge and Pacific Railroad Company, the Union Trust Company of New York, and Samuel D. McEnery, were ordered to appear, plead, answer or demur to said cross-bill under the provisions of the statute, and this order was directed to be published in the Shreveport Journal, and if practicable to be served upon the said defendants (p. 86). By reference to pages 87 and 88, it will be seen that the order to plead was published in the Shreveport Journal and served upon Samuel D. McEnery. On the 22d November, 1886, the complainant Parker appeared to the cross-bill and filed a general demurrer thereto (Transcript, p. 88). On the 24th December, 1886, Walter A. Hamlin, of New York, came into the case by petition (found at pp. 89 and 90), claiming to be a holder of five bonds of the same issue as those sued upon by the complainant Parker, and by order of the Hon. D. A. Pardee, Circuit Judge, was admitted as a complainant in the cause (Transcript, p. 90). By stipulation found also at p. 90, dated March 23d, 1887, it was agreed between the solicitor for Hamlin and the solicitors for the respondents that the cause should stand and be considered as if he had been one of the complainants in the original bill, and that the pleadings of complainant Parker should be considered as Hamlin's also, and the pleadings of the defendants, the New Orleans Pacific Railway Company and of Messrs. Dillon and Alexander, should apply equally to said Hamlin, and "the said defendants should have leave to withdraw from their annswer and cross-bill all exception, plea and defense of prescription of five years, and allegations respecting the same." By this stipulation Ham-

lin not only adopted the original bill of complaint but the demurrer to the cross-bill, and made an agreement with reference to the said cross-bill, and also adopted the replication which is found at page 78. By reference to p. 39 of transcript, it will be seen that Hamlin's solicitor also appeared at taking of testimony and made another stipulation as to the cross-bill. On the 28th March, 1886, as appears by the minutes on p. 98 of the transcript, a demurrer to the cross-bill was sustained and the cross-bill was dismissed. It will be observed that the court thus sustained the demurrer of the complainant Parker, which had also been formally adopted and submitted by the other complainant Hamlin, and dismissed the cross-bill *in toto*. In the opinion of the court the cross-bill was unnecessary and improper as to all the parties made defendant by and in said cross-bill. It was, therefore, impossible to take any further proceedings upon the cross-bill. No further proceedings therefore were taken thereon against the New Orleans, Baton Rouge and Vicksburg Railroad Company, nor against the Union Trust Company, nor against Samuel D. McEnery. It would have been a vain thing to attempt to proceed further against them, to ask for a decree *pro confesso*, or attempt to make such decree final when the Court had dismissed the bill *in toto*, as a bill not useful or proper to be filed. And this will further appear by reference to p. 99, where it will be found that a like decree was made and signed in open Court February 28, 1888, dismissing the cross-bill, *in toto*, and a memorandum of this fact is contained at the end of the decree in favor of Hamlin, foot of p. 102.

In June, 1887, with consent of both complainants, and with leave of the Court, the New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, the respondents, filed their supplemental answer, setting up the passage by the

Congress of the United States of the Act of February 8th, 1887, of which a copy is annexed, the acceptance of said Act by the New Orleans Pacific Railway Company and its agreement to discharge all the duties and obligations which had been imposed on the New Orleans, Baton Rouge and Vicksburg Railroad Company by the Act of March 3d, 1871, and the issuance by the Secretary of the Interior of his orders thereon, also annexed to said supplemental answer. This supplemental answer, the Act of Congress of February 8th, 1887, therein referred to, and the letter from the Department of the Interior of June 6th, 1887, together with the maps showing the New Orleans Pacific Railway as built, and the general location of the New Orleans, Baton Rouge and Vicksburg Railroad as projected are found at pp. 92-97 of the transcript, inclusive.

The cross-bill having been thus disposed of, *in toto*, in March 1887, on the 26th October, 1887, the cause came on for final hearing upon the testimony which had been taken by consent and the documents offered by the respective parties, viz: the complainant Parker, the complainant Hamlin and the respondents, the New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander. A note of evidence or statement of evidence adduced in the cause is found at pp. 25 and 26. The complainant Parker offered what is described on p. 25, the co-complainant Hamlin offered the same and in addition his five bonds which it was stipulated were of the same issue as those held by the defendant Parker and the respondents offered the evidence listed at p. 26 and printed at pp 38 to 97 inclusive.

As already remarked, the late clerk of the lower court has not arranged this testimony in such a skilful and consecutive manner as could have been desired, but the documents will be found at the pages which we indicate, and they will be found to have been offered in evidence on the part of the respondents and filed

on the said date of final hearing and argument, October 26th, 1887. Stipulations have also been filed explaining the arrangement and correcting sundry errors of the transcript.

The testimony of Edward B. Wheelock, on behalf of the respondents, taken by consent, is found at pp. 34 to 43 inclusive, and the mass of documents testified to by him and offered in evidence in connection with his testimony extend from p. 43 to p. 97. Mr. Wheelock established by his testimony beyond dispute the facts set up in the answer, as well as in the cross-bill, with reference to the construction of the railroad from New Orleans to Shreveport by the New Orleans Pacific Railway Company. He states without any contradiction, and no contradiction can be made, that the bonds secured by the acts of mortgage made by the respondent, the New Orleans Pacific Railway Company, to the respondents, Messrs. Dillon & Alexander, were issued under that mortgage to the extent of $2.50 per acre, which upon the number of acres mentioned in the bill would amount to upwards of $1.500,000; that in order to construct this New Orleans Pacific Railway under the circumstances that existed in Louisiana at that time, it being impossible to obtain the necessary capital in Louisiana, it was necessary to make an agreement with the American Railway Improvement Company, which was the construction company that built the road, that it should have the proceeds or benefit of the land grant which is in question in this cause, and the right to which had been assigned to the New Orleans Pacific Railway Company. This agreement was carried out by the issue of the bonds under the acts of mortgage, mentioned in the bill and in the answer, of April 17th, 1883, and January 5th, 1884. They were turned over to the American Railway Improvement Company in settlement of their contract for the construction of the railway. The question of definite location of this railroad from New Orleans to Shreveport is also explained by Mr. Wheelock

(pp. 40-42) and the documents offered, introduced and filed in connection with his testimony. The dates of definite location were fixed by the Department of the Interior and approved by President Arthur as the date of the actual construction and completion of this New Orleans Pacific Railway from New Orleans to Shreveport, in 1881 and 1882. It is also established by Mr. Wheelock's testimony, at page 42, and there will be no dispute in regard to this proposition, that the New Orleans, Baton Rouge and Vicksburg Railroad Company never built any railroad whatever in Louisiana. The witness further shows that the Act of Congress of February 8th, 1887, had been accepted by the New Orleans Pacific Railway Company and said acceptance recognized by the Department of the Interior. He also testified without any dispute, that the New Orleans Pacific Railway Company had been obliged to pay and did pay in order to obtain the patents for the land grant lands which are described in the bill of complaint, large expenses for surveying, selections and conveying of the lands, amounting to upwards of $20,000, and at the time this testimony was taken (March, 1887) had paid from ten to twelve thousand dollars of taxes on these lands. The documents offered and received in evidence in connection with Mr. Wheelock's testimony, will be found in the transcript as follows: The quit claim, deed or assignment of the right, title and interest of the New Orleans, Baton Rouge and Vicksburg Railroad Company in the land grant of 1871 to the New Orleans Pacific Railway Company, p. 43; the acceptance of the same at p. 44, and the ratification of the said transfer by the directors and stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company at pp. 45-48; the letter of the Secretary of the Interior, approved by President Arthur, at pp. 48 to 51. By this, Secretary Teller (p. 50) decided that the New Orleans Pacific Railway Company had earned the lands in

question by the building of 328 miles of road which had been examined and found to have been properly constructed, and recommended that patents for such lands as might have been earned with reference to that portion of the road extending from Whitecastle to Shreveport should be issued to the *New Orleans Pacific Railway Company.* This decision of the Secretary was approved by President Arthur (p. 50). The next document, found at pp. 51–53, is a report by L. Harrison, Acting Commissioner of the General Land Office. It shows that no map of definite location of any railroad concerned in the premises was filed prior to the construction of the road, and fixes the actual construction of the New Orleans Pacific Railway as the date of definite location. It may here be remarked that the same dates were adopted by the Act of Congress of February 8, 1887. By the next document, found at p. 53, the New Orleans Pacific Railway Company accepts these dates of definite location. The document found at pp. 54-55 is an acceptance by the New Orleans Pacific Railway Company of the Act of Congress of February 8, 1887. The next documents, extending from pp. 55 to 77, are the mortgage acts made by the New Orleans Pacific Railway Company to John F. Dillon and Henry M. Alexander, mentioned in the pleadings and offered in evidence. At pp. 92-97, inclusive, are found as offered in evidence and filed October 26, 1887, at the final hearing, the said Act of Congress of February 8, 1887, and the Exhibit S[1] and H, being the letter from the Department of the Interior, General Land Office, and the maps offered in connection therewith. It was agreed in the statement of evidence, p. 26, that the list there found shows the date of the recordation of the land grant mortgages of the New Orleans Pacific Company to be as follows in all the parishes concerned: The original mortgage of April 17, 1883, was recorded in all the parishes concerned in April and May, 1883, and the supplemental mortgage of January 5,

1884, was recorded in February, 1884, in the same parishes. As for the recordation, or registry, as it is sometimes called in Louisiana, of the complainant's mortgage of 1870, the statement of evidence and the different papers offered by complainants (pp. 22 to 25 inclusive) together with the stipulation which has been made between the counsel in regard to the transcript, show that the mortgage of 1870 was recorded in the Parishes of De Soto, St. Landry, Natchitoches and Rapides in 1870, and in the Parishes of Calcasieu, Sabine and Grant for the first time in 1885. No recordation in any other parish of the mortgage of 1870 is shown.

A number of stipulations have been made to decrease the bulk both of the manuscript and printed record. By the one found at pp. 109 and p. 112, it is agreed that the patents offered and referred to in the cause need not be copied in the transcript at all, but a copy of one (which is found at pp. 109-111) may be inserted and used as a sample of the said patents. The lists of selections are also omitted from the printed transcript by consent (pp. 112-115). Acts of Congress and State Statutes offered in evidence are also agreed to be omitted from the transcript and may be referred to on appeal in the printed volume of the laws. The minutes at pp. 98-99 show that the cause having been heard on the merits on the 26th October, 1887, was taken under advisement.

On the 20th January, 1888 (p. 99), a decision appears to have been made on behalf of complainant and intervenor, the word "intervenor" being used apparently to characterize the co-complainant Hamlin. On the 20th February, 1888, as appears by the minutes and decrees found at pp. 99-103, a decree was made and signed in open Court dismissing the cross-bill *nunc pro tunc*, and a decree rendered in favor of John D. Parker, complainant, against the New Orleans, Baton Rouge and Vicksburg Railroad Company for two several sums of $1200 each, amount of thirty

coupons on each of the two bonds sued upon, with 5 per cent. interest from October 1, 1885. By this decree it was further ordered, adjudged and decreed that the mortgage executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company on the 1st October, 1870, of which an authentic copy had been filed in evidence, to secure the payment of its First Mortgage Construction Bonds and the coupons thereon, including the coupons above mentioned, covers and embraces certain lands granted by the United State, to said Company in aid of the construction of its branch line from New Orleans to Baton Rouge, and thence by way of Alexandria to connect with the line of the Texas Pacific Railway, for which patents were issued by the United States to the New Orleans Pacific Railway Company, assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, which lands are particularly described in lists No. 1 and No. 3 so patented, issued by the United States Land Office at New Orleans, and in lists No. 2 and 4 of lands so patented to it by the United States Land Office at Natchitoches, which lists are filed in evidence by complainant. It is then further ordered, adjudged and decreed that said mortgage (meaning the mortgage sued upon, of October, 1st, 1870) exists in favor of said John D. Parker, as holder and owner of said coupons, and to secure payment of same as a first mortgage on said lands *prior to all claims and mortgages set up by respondents herein.* It is then further ordered, adjudged and decreed that there be judgment in favor of the said John D. Parker and against all the defendants herein, recognizing his mortgage rights as hereinbefore set forth. And it is further ordered, adjudged and decreed that said lands hereinbefore described (amounting, as will be remembered, to over 600,000 acres) shall be sold free of all liens, mortgages and encumbrances whatever, to pay and satisfy said sum of $2,400 with 5 per cent. per annum interest

from October 1, 1885, and all costs. A decree was also rendered and signed (pp. 101-102) in favor of Hamlin, the co-complainant, of the same tenor, except that the amount of the decree for coupons held by him is $6,000 with 5 per cent. interest from October 1, 1885. By this decree it is likewise ordered, adjudged and decreed that the mortgage executed by the said New Orleans, Baton Rouge and Vicksburg Railroad Company, October 1, 1870, securing the payment of its First Mortgage Construction Bonds and the coupons thereon, including the coupons of Hamlin herein mentioned, covers and embraces the same lands granted by the United States to said Company in aid of the construction of its railway described in the same manner, for which lands the same patents were issued by the United States to the New Orleans Pacific Railway Company, assignee of said New Orleans, Baton Rouge and Vicksburg Railroad Company, which lands are described in the same lists or exhibits mentioned in the decree in favor of Parker. It was in the same manner further ordered, adjudged and decreed that the said mortgage of 1870 exists in favor of said Hamlin as the owner and holder of said $6,000 of coupons and to secure payment of same as a first mortgage on said lands prior to all claims and mortgages set up *by the respondents herein.* It was further ordered, adjudged and decreed that there be judgment in favor of said Hamlin and against all the defendants recognizing his mortgage rights as hereinabove set forth. It was then ordered, adjudged and decreed that the same lands and all of them should be sold free and clear of all liens, mortgages and encumbrances whatever to pay and satisfy said sum of $6,000 with 5 per cent. per annum interest from October 1, 1885 and all costs. And it was further recited that the demurrer to the cross-bill in this cause having been heretofore maintained, the same had been this day dismissed by decree entered, *nuno pro tunc,* as of January, 1887, thus showing that upon the demurrer filed

by Parker and joined in by Hamlin, the cross-bill had been dismissed as we have stated before, in the early part of the year, 1887, as against all the parties thereto. It should here be observed that on the settlement of said decrees and prior to their rendition, the respondents and appellants in this cause filed with the Judge in open court, a respectful protest against the making of more than one final decree. This paper, omitted by the late clerk, is brought up by stipulation and comes in at p. 99. It seemed to us plain that there was but one cause; that, while it had been begun by John D. Parker, Hamlin had been admitted by the Court as a complainant, with the same mortgage rights and a considerably larger amount at stake; that from the moment Hamlin came in under orders of the court and adopted a bill which had been filed on behalf of all persons similarly situated, and certainly from the time he adopted all the pleadings of Parker including the demurrer to the cross-bill, it was but right and proper that there should be but one final decree settling the rights of the parties. The protest of the respondents however was not held to be valid, and their request that there should be but one decree being refused, the decrees above specified were rendered. As soon as rendered, and on the same day, in open court, an appeal was granted (p. 103) to this Court, to the respondents, upon their allegation that there was error to their prejudice in said decree in favor of Parker, and in said decree in favor of Hamlin, and also in the said decree sustaining the demurrer to the cross-bill, and dismissing the cross-bill. This appeal was granted to all the respondents from the said decrees and the whole thereof. Proper bond for a supersedeas was approved the same day in open court by the Judge and filed in open court, and, together with the order allowing the appeal, entered upon the minutes (p. 99). The bond given by the respondents and so approved, was made in favor of all the other par-

ties to the cause, and of each of them, and of course under the numerous decisions of this Court, no citation was necessary. Citations however were either waived or admitted by all parties, or served.

SPECIFICATION OF ERRORS.

Respondents, appellants, filed with the transcript a specification of errors, as follows:

FIRST. The court below erred in overruling the demurrer interposed to the bill of complaint herein.

SECOND. The court below erred in sustaining the demurrer to the cross-bill which was filed by these appellants.

THIRD. The court below erred in dismissing said cross-bill.

FOURTH. The court below erred in rendering the final decrees in favor of the complainant Parker and the complainant Hamlin.

FIFTH. The court below erred in adjudging the bonds and mortgage sued upon by complainant and co-complainant to be the acts and deeds of the New Orleans, Baton Rouge and Vicksburg Railroad Company.

SIXTH. The court below erred in decreeing the mortgage sued upon by complainant and co-complainants to be a lien on the lands granted by the 22d Section of the Act of Congress of March 3, 1871, set forth in the bill.

SEVENTH. The court below erred in denying the claim of appellants that the mortgage made by the New Orleans Pacific Railway Company to Dillon and Alexander, trustees, is the first lien on the lands granted by the said 22d Section of the Act of Congress of March 3, 1871.

EIGHTH. The court below erred in holding that the claims of the complainants (even if having any force, which is denied) were not barred by the laches set up in the answer.

NINTH. The court below erred in denying to appellants the equities claimed in the answers and established by the evidence arising

from the *definite location and building* of the railway by the New Orleans Pacific Railway Company, the earning by it of the lands in question, and the mortgaging of the lands to pay for the construction of the road and the expenditures by appellants for patents and taxes.

TENTH. The court below erred in denying the rights claimed by appellants under the Act of Congress of February 8, 1887.

To which may be added:

ELEVENTH. The court below erred in holding that the alleged mortgage of 1870 was recorded so as to affect the respondents, appellants, and required no reinscription.

TWELFTH. The court below erred in not rendering one final decree to settle the rights of the parties.

MOTION TO DISMISS.

John D. Parker, one of the appellees, has filed a motion to dismiss. This, of course, is a motion to dismiss *only as to himself*, upon the ground that as between him and the appellants, the value or sum of the matter in dispute, exclusive of costs, does not exceed $5,000. The point to this motion, as stated in the brief in support of it is, that this suit involves two separate and distinct controversies, one between John D. Parker and the appellants, and one between Hamlin and the appellants; that there were separate decrees rendered in the cause, and that these decrees cannot be aggregated for the purpose of giving jurisdiction to this Court. It is stated by the counsel of Parker, in his brief, that the matter in dispute in this Court between the appellants and the appellee Parker, is whether or not a mortgage on certain property should be foreclosed, and such property be sold to pay and satisfy the sum of $2,400, with interest at the rate of 5 per cent. from October 1, 1885. We have already noted the fact that the respondents and appellants protested against the rendition of

separate decrees, and protested against the rendition of more than one final decree in such a cause, and we have already indicated the reasons which we think conclusive in favor of the validity of such a protest. There may be situations in which appellants are not allowed to aggregate decrees for the purpose of giving this Court jurisdiction. We think it may be equally said that there are cases where a lower court should not be permitted to split up a cause and render separate decrees, for the purpose of depriving the Supreme Court of the United States of jurisdiction. We submit that the motion to dismiss ought to be denied for manifest reasons. We submit that the counsel for Parker is mistaken in his statement as to what is the matter in dispute. We may note, however, that, as we understand, at foot of page 6 of his brief, he admits that our lands on which he claims a lien exceed $5000 in value.

This is not a case where Parker claims under one lien and Hamlin under another. Parker filed a bill on behalf of himself and all others similarly situated. Hamlin, claiming to be similarly situated, came in and was made a co-complainant. So far as the mortgage of 1870 is concerned, or any other mortgage mentioned in the record, a mortgage claim is *indivisible*. It is elementary that mortgages on property in Louisiana are governed by her laws; and the Civil Code, Art. 3282 (3249), declares that: "The mortgage is a real right on the property bound for the discharge of the obligation, and it is in its nature indivisible and prevails over all the immovables subjected to it, and over each and every portion." And this means that a mortgage does not admit of partial execution, Art. 2109 (2105), and should be enforced by one decree as to all the objects mortgaged.

The mortgage of 1870, whatever it covered, was a common security to both Parker and Hamlin. There should not have been two decrees, by one of which all the property directed to be

from the *definite location and building* of the railway by the New Orleans Pacific Railway Company, the earning by it of the lands in question, and the mortgaging of the lands to pay for the construction of the road and the expenditures by appellants for patents and taxes.

TENTH. The court below erred in denying the rights claimed by appellants under the Act of Congress of February 8, 1887.

To which may be added:

ELEVENTH. The court below erred in holding that the alleged mortgage of 1870 was recorded so as to affect the respondents, appellants, and required no reinscription.

TWELFTH. The court below erred in not rendering one final decree to settle the rights of the parties.

MOTION TO DISMISS.

John D. Parker, one of the appellees, has filed a motion to dismiss. This, of course, is a motion to dismiss *only as to himself*, upon the ground that as between him and the appellants, the value or sum of the matter in dispute, exclusive of costs, does not exceed $5,000. The point to this motion, as stated in the brief in support of it is, that this suit involves two separate and distinct controversies, one between John D. Parker and the appellants, and one between Hamlin and the appellants; that there were separate decrees rendered in the cause, and that these decrees cannot be aggregated for the purpose of giving jurisdiction to this Court. It is stated by the counsel of Parker, in his brief, that the matter in dispute in this Court between the appellants and the appellee Parker, is whether or not a mortgage on certain property should be foreclosed, and such property be sold to pay and satisfy the sum of $2,400, with interest at the rate of 5 per cent. from October 1, 1885. We have already noted the fact that the respondents and appellants protested against the rendition of

separate decrees, and protested against the rendition of more than one final decree in such a cause, and we have already indicated the reasons which we think conclusive in favor of the validity of such a protest. There may be situations in which appellants are not allowed to aggregate decrees for the purpose of giving this Court jurisdiction. We think it may be equally said that there are cases where a lower court should not be permitted to split up a cause and render separate decrees, for the purpose of depriving the Supreme Court of the United States of jurisdiction. We submit that the motion to dismiss ought to be denied for manifest reasons. We submit that the counsel for Parker is mistaken in his statement as to what is the matter in dispute. We may note, however, that, as we understand, at foot of page 6 of his brief, he admits that our lands on which he claims a lien exceed $5000 in value.

This is not a case where Parker claims under one lien and Hamlin under another. Parker filed a bill on behalf of himself and all others similarly situated. Hamlin, claiming to be similarly situated, came in and was made a co-complainant. So far as the mortgage of 1870 is concerned, or any other mortgage mentioned in the record, a mortgage claim is *indivisible*. It is elementary that mortgages on property in Louisiana are governed by her laws; and the Civil Code, Art. 3282 (3249), declares that: "The mortgage is a real right on the property bound for the discharge of the obligation, and it is in its nature indivisible and prevails over all the immovables subjected to it, and over each and every portion." And this means that a mortgage does not admit of partial execution, Art. 2109 (2105), and should be enforced by one decree as to all the objects mortgaged.

The mortgage of 1870, whatever it covered, was a common security to both Parker and Hamlin. There should not have been two decrees, by one of which all the property directed to be

sold is to be sold, to pay Parker's coupons, and by the other of which all the same property is directed to be sold to pay the coupons of Hamlin. We protested, as already observed, that there should have been but one decree, but our protest was disregarded; and, indeed, there were three decrees made on the same day, one dismissing the cross-bill on Parker's demurrer in which Hamlin had joined, and dismissing it as to all the parties made defendant therein; another in favor of Parker, and another in favor of Hamlin, and the appeal was taken from all of them. The fact is, that the case is a very different one from many of those in this Court in which appeals have been dismissed for want of sufficient amount or value of matters in controversy. Parker did not seek merely to obtain a judgment or decree against a mortgage debtor with a recognition and enforcement of the mortgage upon the *property described therein;* he brought a suit as above remarked, in favor of himself and all others similarly situated, having a much more extensive scope. He averred that under a mortgage of 1870 his mortgage debtor had really included in the description of the mortgage lands to the amount of over 600,000 acres, which at that moment were the property of the United States, concerning which a land grant was never made until March, 1871, which were never definitely located by his mortgage debtor, which were not averred to have been earned by his mortgage debtor, and which, on the face of his bill, passed directly from the United States to another defendant in the bill, to-wit., the New Orleans Pacific Railway Company. No objection is made by the bill to the validity of the conveyance to the New Orleans Pacific Company of the right to locate and earn said land grant made by the 22d Section of the Act of March 3, 1871. The bill does not deny but admits practically that the railroad contemplated by that section was definitely located and constructed by the New Orleans Pacific Railway Company alone.

The bill does not deny, but admits the making of the mortgages on the lands by the New Orleans Pacific Railway Company, the defendants, John F. Dillon and Henry M. Alexander, and the issue of bonds at the rate of $2 50 per acre secured by those mortgages. Yet, the complainant Parker, averring that there are *five hundred bonds* outstanding of the issue of October 1, 1870, of which he holds two, and on behalf of the other holders of which he files his bill, avers that the mortgage of 1870 includes and covers over 600,000 acres of land, worth, at Government prices, at least $1,700,000, and is a lien prior to the bonds issued under the mortgages made by the New Orleans Pacific Railway Company, which bonds amount to at least $1,500,000. So that if Hamlin had never come in the suit at all, it seems to us that the matter in dispute would have been the lien of that mortgage of 1870 upon this large body of lands, and the asserted priority of the lien of $500,000 of bonds of 1870 to the lien of some million and a half of bonds issued under the mortgages of the New Orleans Pacific Railway Company. But, when Hamlin came in, the cause was made, if need be, still more plainly appealable since there were now by the orders of the court two complainants, whose claims aggregated about $9,000, and one of whom had a decree for over $6,000, who united in the attempt to enforce the proposition that the mortgage of 1870, securing about $500,000 of bonds, was a lien upon property, not of their debtor, but of somebody else, to wit: The New Orleans Pacific Railway Company, and was prior to the bonds and mortgages represented by Dillon and Alexander as trustees. So, when we look at the decree in favor of Parker (p. 100). we find that it utterly ignores the description contained in the mortgage of 1870, it does not pretend to sell the property by that description, but it declares over 600,000 acres of our land to be included in that mortgage; that said mortgage of 1870 is prior to all claims and mortgages set up

by the respondents herein, and orders the said lands, worth, at Government prices, say, $1,700,000, to be sold free from all liens, mortgages and encumbrances whatever, thus undertaking to divest the title of the New Orleans Pacific Railway Company to all of these lands by a judicial sale, and to wipe out the mortgages imposed by that Company in favor of Dillon and Alexander, trustees.

When we look at the decree in favor of Hamlin, pp. 101-103, we find the same provisions, and we think we are justified in asserting that the decree in favor of Parker is itself a legitimate subject of appeal by respondents whose rights are sought to be destroyed by that decree; that the decree in favor of Hamlin is conceded to be appealable, and that the appeal taken in the cause (p. 103) ought to be maintained in its entirety.

There is another element in the case also. It will be observed from the statements heretofore made in this brief, and the references to the record, that the cross-bill was filed against Parker and all the other parties in the case, and this with leave of the Court; and in the cross-bill, pp. 83-84, it is declared that the complainant Parker sues on behalf of himself and all other holders of bonds issued under said mortgage, and the cross-complainants aver that he *represents* upwards of 200 of such bonds or some association of persons holding that number, and his demurrer admitted the truth of that allegation, and as already shown, the complainant Hamlin having been admitted into the case as a complainant some time after the cross-bill was filed, but before it had been dismissed, adopted all the pleadings of Parker, including the demurrer to the cross-bill, and thereafter the cross-bill was dismissed, not only as to Parker and Hamlin, but as to all the other defendants in that cross-bill. It became impossible therefore for the appellants in this cause to proceed any further with their cross-bill; they could only wait until the

final decree or decrees were rendered in the case and bring up the question of the rightfulness of that dismissal of the cross-bill by the appeal from the final decree or decrees. This rule was settled in Ayres vs. Carver, 17 Howard, p. 595, and will not be controverted. The appeal was taken in open court on the same day, and of course at the same term that the decrees were made and signed, and was entered on the minutes, pp. 99-103. It alleges error in each and all of the three decrees; the appeal was granted from said decrees and the whole thereof; it brings up the whole question of the bill and the cross-bill; and the matter in dispute between the appellants and Parker is not the number of dollars due by the New Orleans, Baton Rouge and Vicksburg Railroad Company to Parker, but the right of the New Orleans Pacific Railway Company to hold its lands free from a lien of $500,000 of bonds of 1870 with an equal amount of past due interest, and of Dillon and Alexander as trustees of the mortgages to be free from such prior lien. It is the right of the New Orleans Pacific Railway Company, and its trustees and mortgagees, respondents and appellants, not to have upwards of 600,000 acres of lands which have never belonged to anybody except the United States and the New Orleans Pacific Railway Company sold free and clear of all encumbrances imposed in favor of Dillon and Alexander. As was remarked in Buckingham vs. McLean, 13 Howard, 150, 151, the appeal brings up all questions in the cause which were decided to the prejudice of the appellants. It brings up what we submit to be the palpable error of the lower court in dismissing the cross-bill, and the equally palpable error in each of the other two decrees in declaring the mortgage of 1870 to be a lien on the land grant lands of the New Orleans Pacific Railway Company not even alluded to in that mortgage, and to have a lien superior to that of Dillon and Alexander as trustees, and in directing the vast quantity of property of the New

Orleans Pacific Railway Company to be sold free and clear of all encumbrance. And furthermore, as said in Ayers vs. Carver, 17 Howard, 591-595, the original bill of Parker as adopted by Hamlin, and the cross-bill, constitute but one suit.

See for same doctrine, Ex Parte R. R. Co., 95 U. S., 221-225.

Ayers vs. Chicago, 101 U. S., 184-187.

First National Bank vs. Salem Co., 31 Fed. Rep., 580, and authorities there cited.

And the cross-bill is a very important proceeding in the suit. It seeks, in accordance with the theory and customs of equity, (137 U. S., 171, 201) to decide the whole question of alleged conflicting liens of not less than one million dollars on lands worth not less than that sum. This cross-bill was dismissed in a manner unusually erroneous and improvident. Its admitted allegations as against Parker alone are that there are $500,000 of bonds outstanding under the mortgage of 1870; that Parker represents upwards of 200 of such bonds or some association of persons holding that number; that suing as he does on behalf of himself and all persons similarly situated, and asserting that the mortgage of 1870 is superior to our mortgage of 1883-1884, a cloud of great magnitude is cast upon the titles of the cross-complainants, as patentees and mortgagees, and they are continually embarrassed in and prevented from selling the lands and executing the duties of the trust and realizing the true value of said lands by reason of this claim set up by Parker. It would certainly be a very remarkable thing if, under the circumstances of this case, Parker could be allowed to obtain an unappealable decree of the Circuit Court of the United States, declaring that the mortgage by which he claims to be secured, with its 500 outstanding bonds, not only has a lien upon lands of the New Orleans Pacific Railway Company, to the extent of over 600,000 acres, which were not so much as alluded to in

the mortgage of 1870, and that that lien is superior to the mortgage in favor of Dillon and Alexander, securing payment of over $1,500,000 of bonds, but directing all these lands to be sold free and clear of all mortgages, liens and encumbrances. It should be noted in passing that the counsel of Parker in his brief on the motion to dismiss makes an error of omission at p. 71, which ought to be corrected. It is true, as there stated, that the bonds secured by the mortgage of 1870 contained the words italicized by the counsel "*or by Act of Congress*," but the Act of the Legislature of Louisiana of 1869, which authorized the making of this mortgage, and the mortgage itself, do not contain the words at all. (Trans. pp. 11-14, inclusive). No reference is made by the mortgage to any Act of Congress at all, nor was there any Act of Congress germane to the subject at that time. Manifestly it would have made no difference if the mortgage had contained the phrase "or by Act of Congress," because the lands in question could not rationally be characterized as corporate franchises and privileges relative to the construction, operation and use of a main line of railroad and its branches. We shall refer to this matter again.

We submit that the authorities cited by the counsel for Parker in his brief upon this motion to dismiss do not support his contention.

Ex-Parte Phoenix Insurance Company, 117 U. S. 367, was a case where the decree was against four separate defendants on four separate and distinct liabilities, and there was no claim of a common mortgage or attempt to make that mortgage, of appealable amount, prime another of appealable amount. Liabilities were incurred by a common agent, but none the less were entirely distinct. and each was less than $5,000.

Gibson vs. Schufeldt, 122 U. S. 27, was a case of creditors whose claims arose out of different contracts, who did not hold

any common mortgage nor ask that a mortgage of appealable amount be decreed to prime another of appealable amount, on lands of appealable value.

Wheeler vs. Cloyd, 134 U. S. 537, was a suit where the appellants were each separate owners of separate tracts of land, the amount to redeem which was, as to each, less than $5,000.

The Smith M. P. Co. vs. McGroarty, 136 U. S., p. 239, was a bill by creditors with entirely distinct claims and no common mortgage or claim such as here made against respondents, and no attempt to make a lien of appealable amount prime a lien of appealable amount.

Gordon vs. Ogden, 3 Peters, p. 33, decides nothing with reference to the circumstances of this case.

Bruce vs. Manchester, etc., 117 U. S. 514, was a case against a mortgagor alone by holders of coupons of the mortgage bonds, whose two claims together were less than $5,000, and there was no such claim as that made here against respondents, no matter of dispute concerning the comparative lien of mortgages of appealable amounts, on lands of appealable value.

Elgin vs. Marshall, 106 U. S. 578, was a suit at law by one plaintiff on coupons of an amount less than $5,000. There was no mortgage, no provocation of a conflict of liens, none of the matters here in dispute between Parker and the respondents.

Seavers vs. Bigelow, 5 Wall, 208, was a case of separate creditors on distinct claims, with no act of mortgage and no demands such as have been made against us in this case.

Ross vs. Prentiss, 3 Howard, 771, was an injunction suit against a seizing creditor for about $635. We may here note what we submit to be another error on the part of counsel for Parker at pp. 14 and 15 of his brief. It is a mistake, we submit, to say that the cross-bill was only brought against Parker. Respondents brought their cross-bill with leave of the court against all the

other parties to the cause, and a short time after it was so brought Hamlin came into the cause and, by stipulation at p. 90 of the transcript, already referred to, recognized the pendency of the cross-bill, made an agreement with respect to it and adopted all the pleadings of the complainant Parker, including the demurrer to the cross-bill, and thereafter the cross-bill was dismissed by the Court as to all parties. Nor is it correct to say that nothing was done by way of having process on the cross-bill against the other parties. The order to plead was made under the Act of Congress concerning absent defendants in case of liens and clouds on title. It appears by reference to p. 87 of the transcript, to have been published in the Shreveport Journal, and also to have been served on the defendant McEnery personally; and further proceedings to serve the order, to take if necessary a decree *pro confesso*, and to confirm the same at the termination of the cause in the Circuit Court, were completely prevented and cut off by the improvident order of March 28, 1887, dismissing the cross-bill, *in toto*, as to all its parties, and this order was put into a decree signed, *nunc pro tunc*, February 20th, 1888.

There is a decision of this Court in the case of Bradley vs. Claflin, 132 U. S. 379-383, which is entirely in point against the motion to dismiss in this cause. One of the undersigned was of counsel in that cause and can speak of it with some precision. It will be seen by reference to p. 383 of the 132d U. S. that three of the appellees in that case had claims much less than $5000, viz: $655.38, $2326.36 and $2298.57. The counsel for those appellees made a motion to dismiss the appeal of Mrs. Bradley, *as to them*, and the motion was not only argued in the printed brief, but was argued orally upon the argument of the merits, it having been made in the same brief. Although the report of the case does not mention this fact, yet it is plain enough to anyone who is familiar with the record, that Mr. Justice Miller, in deliv-

ering the opinion of the Court, brought out the circumstances and the amounts involved in such a way as to make an answer to the motion and to really deny it without discussion. But more than this, if your Honors will take the trouble to examine the record and printed arguments filed in that case, you will find that not only was this motion to dismiss made and argued in the original briefs, but after the rendition of the opinion and decree of your Honors, by Mr. Justice Miller, an application for a rehearing was filed on behalf of those three appellees, by Mr. James Lowndes, of the Washington bar, in which he expressly relied upon the case of Gibson vs. Schufeldt, and the other similar cases now cited by counsel of Parker. But your Honors did not grant the application for a rehearing, and in other words you refused it. Now, why was this earnest application to dismiss as to those three appellees in Bradley vs. Claflin refused? Manifestly because appellant, Mrs. Bradley, made a defendant below, claimed a mortgage of upwards of $29,000 upon lands claimed to be worth $10,000, and, exactly as in this case, she had filed a cross-bill, which was held to have been erroneously dismissed upon the demurrer of a part of the defendants thereto, including those appellees whose claims were each far less than $5,000. The matter in dispute was the amount of her mortgage, or at least the value of the land upon which it was a lien. The decree in the case as to the appellees who were creditors for amounts less than $5,000 each, was as to them even less clearly appealable by Mrs. Bradley than Parker's decree is by us in this case, for those three appellees claimed *no common mortgage and derived no right from any common contract*. But they did, as in this case, question the rights of a mortgagee for an appealable amount. The reasons for refusing the motion to dismiss in this case are stronger on principle. In the case of Bradley against Claflin it will be further found upon examination of the record, that the counsel for Mrs.

Bradley, in opposing the motion to dismiss, made by the three appellees above mentioned, cited the following authorities, which we also cite:

Market Co. vs. Hoffman, 101 U. S. 113.
May vs. Sloan, 101 U. S. 231.
Davies vs. Corbin, 112 U. S. 36.
The Rio Grande, 19 Wall. 178.
Rodd vs. Heartt, 17 Wall. 355.
The Connemara, 103 U. S. 754.
The Mamie, 105 U. S. 773.
Ex Parte B. & O. R. R., 106 U. S. 5.
Shields vs. Thomas, 17 How. 3.
Freeman vs. Dawson, 110 U. S. 264.

The case of Shields vs. Thomas, above cited, 17 Howard, p. 3, seems to be very much in point in our favor. In that case, p. 3, counsel moved to dismiss the appeal for want of jurisdiction, as the amount of none of the *several decrees* was for $2,000, that sum being then the minimum limit of jurisdiction, but the motion to dismiss was refused, Mr. Chief Justice Taney delivering the opinion of the Court, upon the ground that the matter in controversy was the sum due to the different complainants collectively, and said:

"They all claimed under *one and the same title.* They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them upon this point, and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves and not with him. It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions, yet if a controversy arises on the

contract and the sum in dispute upon it exceeds $2,000, an appeal would clearly lie to this Court, although the interest of each individual was less than that sum."

This seems to be strikingly in point. There were a *number of separate decrees*, in favor of different appellees, against Shields, who was said to have in his possession certain property to which the appellees were entitled; to be divided among them, as the Chief Justice says, in equal or unequal proportions. If the case had gone the other way in the lower court, and one of those appellees had been appellant, a different question might have been presented, and perhaps this is one reason of the apparent confusion which has arisen in regard to the question of appealability of causes; but, precisely as in the case at bar, it was Shields who appealed, and because as stated at p. 4, the whole amount recovered against Shields in the proceeding in Iowa exceeded $2,000, it was held that the amount in dispute exceeded $2,000. Applying this principle to the case at bar, we find this state of things: Parker and Hamlin are certainly co-complainants, the suit was filed on behalf of all persons similarly situated with Parker, and Hamlin was made a complainant by an undisputed and existing order of the Court. The fact that there were two decrees, or including the decree dismissing the cross-bill, three, can make no more difference than it did in the case of Shields vs. Thomas. It matters not to the respondents how the proceeds of the sale of property decreed by the two final decrees, as the Chief Justice remarked, are to be shared between Parker and Hamlin, if such a sale as that decreed should be permitted to take place. We have no controversy with either of them on that point, and if there should be any difficulty as to the proportions in which they are to share, the dispute would be among themselves and not with us. The fact remains that the two decrees, and each of them, as appears by the Transcript, pp. 100 to 102, inclusive, de-

clare, as we contend, most erroneously, that the mortgage of 1870 relied upon as a common security by both complainants, covers and embraces over 600,000 acres of land patented by the United States to the New Orleans Pacific Railway Company, as the patents declare, p. 111, "to have and to hold the same with the appurtenances, unto the said New Orleans Pacific Railway Company, and to *its* successors and assigns forever," and that this mortgage of 1870 is prior to all claims and mortgages set up by the New Orleans Pacific Railway Company and by Dillon and Alexander, mortgagees and trustees in the land grant mortgages of the latter Company, on which bonds have been issued and paid out to the extent of over $1,500,000, and direct all of said lands, of still greater value, to be sold to pay and satisfy claims of Parker for $2,400 and interest, and Hamlin for $6,000 and interest. We must confess that we are unable to understand how it can be held under such circumstances that Parker should be allowed to file a bill on behalf of himself and all others similarly situated, and when another person similarly situated has been joined as complainant, endeavor to have himself dismissed out of the case.

The motion to dismiss ignores the fact that this was a class suit by Parker. He sued not only on behalf of himself but of all similarly situated. He extended an invitation which was accepted by Hamlin, and Hamlin came in. Whatever the case may have been before Hamlin came in, yet after he was made a complainant, the matter in dispute as to the respondents was whether or not the mortgage of 1870 bore on the lands of the New Orleans Pacific Railway Company, amounting in all to over 600,000 acres, and, if so, whether it primed the lien of the mortgage of 1883-4 to Dillon and Alexander. The amount of value of this matter in dispute was, at least, $8,400, with five per cent.

interest from October 1, 1885, to the date of the final decree, if it be not a matter rising to the millions.

We should perhaps correct another error in the brief of Parker, on motion to dismiss, at p. 9 of that brief. The property averred by the bill to have been mortgaged October 1, 1870, was not "all *now owned or which shall hereafter be acquired.*" The bill and exhibits, Trans. pp. 4-5 and pp. 12-13, will show the description as pleaded and as it was. It was by no means a mortgage of all property then owned or to be acquired thereafter, but only of certain railroads constructed or to be constructed and of future property which should be appurtenant thereto, etc.

It further appears by answer, cross-bill and proof, that the New Orleans Pacific Railway Company expended for selection fees, etc., and for taxes on the lands in question, at least $30.000 (*ante*, p. 27), and the equities as to this sum are in dispute in the cause, under the 9th specification of error.

We submit that the motion to dismiss should be denied. We, however, deem it proper to suggest and earnestly urge upon the consideration of the Court, that this cause is one of great importance affecting the title to a large quantity of land in the State of Louisiana, and of very many persons; that the main cause is No. 137 on the docket of this Court and will be reached in regular order within the next few days, when the nature of the pleadings, proceedings and decrees will necessarily come under careful scrutiny and review at the bar, and when the Court will necessarily obtain a much more precise and accurate view of the matters involved, alike on this motion and on the merits, than will be possible upon a detached consideration of the present motion to dismiss. And the appellants urge and insist, under these circumstances, the appellees having delayed the making of this motion until the main cause is on the eve of being regularly reached, that it seems to them clear that the motion to

dismiss should be postponed until, and the questions therein raised considered on, the argument of the main cause. On that argument some most extraordinary features in the proceedings in the court below bearing on the questions raised on this motion will be called to the attention of the Court.

A careful and studied effort has been made to defeat the jurisdiction of the Supreme Court, although the interests affected by the decree reach into the millions. We earnestly protest against the consideration of questions of such complexity and gravity as are raised upon this record on a motion to dismiss. In the case of the Texas and Pacific Railway Company, plaintiff in error, vs. Henry Horn, No. 1258 of the October Term, 1890, a similar attempt to defeat the jurisdiction of this Court was made by the entry of a *remittitur* of judgment of $11,000 to $4,999, followed by a motion, as in this case, to dismiss, which this Court denied, ordering the question to stand over till the case was regularly reached.

We earnestly submit that the like course ought to be pursued here, more especially as the case on the merits is imminent and will be deliberately argued at the bar within the next two weeks.

Respectfully submitted by,

WILLIAM WIRT HOWE,
JOHN F. DILLON, and
WAGER SWAYNE.

Of Counsel for Respondents, Appellants.

DEC., 1891.

FILED,
DEC 3 1891
JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES.

No. 137 of October Term, 1891.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY AND JOHN F. DILLON AND HENRY M. ALEXANDER, TRUSTEES, APPELLANTS,

versus

JOHN D. PARKER ET ALS., APPELLEES.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

BRIEF ON BEHALF OF APPELLANTS.

WILLIAM WIRT HOWE,
JOHN F. DILLON,
WAGER SWAYNE,
For Appellants.

DECEMBER, 1891.

T. H. Thomason, Printer, 33 Natchez St.

SUPREME COURT OF THE UNITED STATES.

No. 137 of October Term, 1891.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY AND JOHN F. DILLON AND HENRY M. ALEXANDER, TRUSTEES, APPELLANTS,

versus

JOHN D. PARKER ET ALS., APPELLEES.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF THE CASE.

The complainant, John D. Parker, one of the appellees, filed his bill in the lower court, February 15th, 1886, on behalf of himself and all persons similarly situated, against the New Orleans, Baton Rouge and Vicksburg Railroad Company, the Union Trust Company of New York, the New Orleans Pacific Railway Company, against John F. Dillon and Henry M. Alexander, who are trustees in the land grant mortgages of the New Orleans Pacific Railway Company, and against Samuel D. McEnery, who was Governor of Louisiana.

The bill sets forth the incorporation of the New Orleans, Baton Rouge and Vicksburg Railroad Company by the Act of the General Assembly of Louisiana, No. 143 of 1869, which was approved December 30th, 1869, and will be found bound up in the Acts of 1870 at page 7. The bill avers that under that Act the said New Orleans, Baton Rouge and Vicksburg Railroad Company was authorized to make and issue its first mortgage bonds, such bonds and the mortgage securing the same to be a prior lien to the extent of $12,500 a mile, payable in coin or currency, or 2500 pounds sterling, bearing interest, not to exceed 8 per cent. per annum, payable semi-annually, upon each and every mile of the *branch and connecting railroads* within the State of Louisiana, including the right of way, road bed, the rails, depots, buildings, stations, shops, machinery, tools, engines, cars and real and personal estate within the State of Louisiana *appurtenant to or necessary for the operation of* said line of railroad and its branch and connecting *roads*, owned by the Company at the date of said mortgage, or which may be acquired by it thereafter and of the franchises and privileges of said Company." The bill proceeds to allege the organization of the Company, a location of certain lines from New Orleans to Baton Rouge and from Baton Rouge to Shreveport, the making of $6,250,000 of bonds, of which sum $1,500,000 are alleged to have been issued *and $500,000 to be outstanding*, and the execution of a mortgage to secure these bonds in favor of the Union Trust Company. It is averred that Thomas C. Bates, acting and under and by virtue of resolutions of the Board of Directors of said Company on the first day of *October, 1870*, mortgaged and hypothecated to the Union Trust Company, aforesaid, for the benefit of whomsoever should, from time to time, hold the aforesaid bonds or coupons or any one or more of the same, certain property, which is described in the

bill and in its Exhibit A as follows—(Transcript, pp. 4 to 12. We copy from the bill):

"The whole of the main line of railroad and its branches and connecting lines, including a *branch line* commencing at the City of Baton Rouge and extending thence through the Parishes of West Baton Rouge, Iberville, Pointe Coupee, St. Landry, Avoyelles, Rapides, by way of Alexandria, Natchitoches and De Soto to Shreveport, and also a branch road commencing on the main line of said road in the Parish of East Baton Rouge, and extending through the Parishes of Ascension, St. James, St. John the Baptist, St. Charles and Jefferson, to the Mississippi River at the City of New Orleans, together with all the rights of way, roadbed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, tenders and other rolling stock, also all real and personal estate within the State of Louisiana owned by said Company at the date of the mortgage, or which may be acquired by it thereafter, appurtenant to or necessary for the operation of said main line of said railroad, or any of said branches connected with said main line, or to be connected therewith. Also all other property, real and personal, of every kind and description whatsoever, and wheresoever situated, in the State of Louisiana, which is now owned, or which shall hereafter be acquired by the said Company, *and which* shall be appurtenant to or necessary or used for the operation of said main line of railroad or any of said branches. Also, all the tenements, hereditaments and appurtenances, *thereunto belonging*, and all of the estate, right, title and interest, legal and equitable, of the said Company and its successors and assigns *therein*, together with the corporate franchises and privileges of said Company, at any time granted, or to be granted, by the State of Louisiana, relative to the construction, operation or use of said railroad within said State."

The bill further avers (p. 5) that, under the terms of the mort-

gage, any holder of bonds or coupons may foreclose, and also avers that the mortgage was duly recorded as required by the laws of Louisiana in the Parishes of Orleans, Jefferson, St. Charles, St. John the Baptist, St. James, Ascension, Iberville, West Baton Rouge, St. Landry, Avoyelles, Rapides, Natchitoches, Sabine, Vernon, De Soto, Caddo, Bossier, Webster, Claiborne, Bienville, Red River, Winn, Catahoula and Calcasieu.

The bill then sets forth (p. 6) the land grant made in favor of the New Orleans, Baton Rouge and Vicksburg Railroad Company by the 22d Section of the Act of Congress of March 3d, 1871, being the original Act to incorporate the Texas and Pacific Railroad Co. By this section it appears that there was granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, the same number of sections per mile of lands of the United States in Louisiana as were granted to the Texas and Pacific Railroad Company in California, namely, ten sections per mile on each side of the line, with a provision in regard to indemnity limits. It may be noted in passing, that this Act of Congress provided that the lands so granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company should be withdrawn from market, selected, and patents issued therefor and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California; and that under the 12th Section of the said Act of March 3d, 1871, lands are only to be patented upon the *completion* of the first and each succeeding section of twenty-five consecutive miles of *railroad put in running order.*

The bill further refers (p 7) to an Act of the Legislature of Louisiana of 1872, No. 100, bound up in the Acts of 1873, p. 29, which is averred to confer on the New Orleans,

Baton Rouge and Vicksburg Railroad Company the right to build a road from *New Orleans to Shreveport.* The Act is made part of the bill and will be referred to hereafter in considering the points in this case.

The bill then avers that the grant of lands by the 22d Section of the said Act of Congress of 1877, was a present grant and vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company the granted lands, and they therefore became immediately subject to the mortgage above recited of October, 1870. It further states (p. 7), that on or about November 11th, A. D. 1871, the said New Orleans, Baton Rouge and Vicksburg Railroad Company filed in the General Land Office of the United States a map designating the *general route* of its road from Shreveport, by way of Alexandria, to Baton Rouge, and thereupon the withdrawal of the public lands upon the same was ordered in accordance with the provisions of the Act of Congress aforesaid. A map purporting to be this delineation of a *general* route is found in the transcript between pp. 14 and 15. The complainant avers that on the faith of the grant he has acquired two of these first mortgage bonds of 1870 with coupons attached, which he makes part of his bill. The bonds are not yet due, but it is averred that thirty of the coupons are due. In other words, no coupons were ever paid.

The bill further avers (p. 7) that on or about the 5th day of January, A. D. 1880 (the year should be 1881, Rec. p. 7), the said New Orleans, Baton Rouge and Vicksburg Railroad Company sold, transferred, assigned and delivered to the New Orleans Pacific Railway Company, all of the right, title and interest in and to the lands so as aforesaid vested in said New Orleans, Baton Rouge and Vicksburg Railroad Company, but that said act of mortgage having been as aforesaid *duly recorded* anterior to the date of said transfer, and anterior to the date of any registry

or record of said transfer, the said sale and transfer was made subject to the mortgage, and the lands sold and transferred were acquired by the New Orleans Pacific Railway Company subject to said mortgage.

The bill further avers that on or about the 3d of March, A. D. 1885, patents of the United States for 679,287 64-100 acres were issued under the authority of the Act of Congress aforesaid to the *New Orleans Pacific Railway Company*, as assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, which lands were averred to constitute a portion of those granted to and vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company; that they were and are subject to the mortgage aforesaid of 1870, and that to enforce payment of the amount of the coupons so due complainant, he is entitled to have the said mortgage foreclosed and to have said lands sold according to law. He avers that said lands are situated in the Parishes of De Soto, Sabine, Natchitoches, Vernon, Rapides, Avoyelles, St. Landry, Calcasieu, Catahoula, Winn, Red River, Bienville and Bossier, in the State of Louisiana, and in the Western District of Louisiana, and that the Court has jurisdiction over the matters presented. He annexes certain certified lists of said lands, the printing of which, in the transcript, has been dispensed with by stipulations of all parties appearing in the cause.

The bill further avers that the said New Orleans, Baton Rouge and Vicksburg Railroad Company had not at the time the bill was filed any office at its legal domicile in the City of New Orleans or elsewhere, and that the Company was wholly insolvent. It appears that this Company has never paid any of the coupons on said bonds of 1870. It is not averred in the bill that the New Orleans, Baton Rouge and Vicksburg Railroad Company ever definitely located a railroad of any sort, or ever filed a map of

definite location in the Department of the Interior, or ever built any road at all, and the fact appears in evidence, as will be noted hereafter, that it never did build any railroad of any kind, description or length whatever.

The bill further avers (p. 9), that on the 28th of December, A. D. 1870, Thomas C. Bates, then President and assuming to act for the New Orleans, Baton Rouge and Vicksburg Railroad Company, made and executed a mortgage in favor of the Governor of the State of Louisiana, as trustee, to secure the payment of 6.250 Second Mortgage Bonds, each for $1,000, with interest coupons attached, which said mortgage embraced the same property described and specified in the mortgage given by said Company to secure its first mortgage bonds (of October 1st, 1870), but the bill avers that said second mortgage was subsequent and subordinate to said first mortgage, and that said Company never issued any of said second mortgage bonds and that the mortgage given to secure same has been *erased, cancelled and extinguished.* Samuel D. McEnery, who was Governor of Louisiana at the time the bill was filed, seems to have been made a nominal defendant with reference to this mortgage. It is further averred (p. 9), that on the 4th September, A. D. 1872, Calvin H. Allen, assuming to act as President of and for the said New Orleans, Baton Rouge and Vicksburg Railway Company, executed a mortgage in favor of the Union Trust Company of New York, on the same property so as aforesaid mortgaged to secure payment of its first mortgage bonds and coupons, which said mortgage of September 4th, 1872, was executed to secure payment of 12,000 bonds each for $1000, with coupons for interest attached, styled, First Mortgage Seven Per Cent. *Land Grant* and Sinking Fund Gold Bonds, but it is averred that said mortgage was subsequent and subordinate to said first mortgage; that said Company never issued any of its said First Mortgage Seven Per Cent.

Land Grant or Sinking Fund Gold Bonds, and that if any of same are now outstanding they are not and never were valid obligations of said Company.

The bill then avers (p. 9) that by acts of mortgage bearing date April 17th, 1883, and January 5th, 1884, the New Orleans Pacific Railway Company made and executed in favor of John F. Dillon and Henry M. Alexander, of the City of New York, trustees, a *Land Grant* and Sinking Fund Mortgage on all the lands acquired by said Company from the New Orleans, Baton Rouge and Vicksburg Railroad Company to secure the payment of Land Grant and Sinking Fund Bonds, limited to an issue of $2.50 per acre on the number of acres of said land, and the bill goes on to aver that said mortgage in favor of Dillon and Alexander is subsequent and subordinate to the mortgage so as aforesaid given and executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company to secure the payment of its first mortgage bonds and coupons (meaning the mortgage of October 1, 1870).

The bill then goes on to state that the Union Trust Company of New York, John F. Dillon, Henry M. Alexander and S. D. McEnery are not inhabitants of the said Western District of Louisiana, and that complainant is entitled to have said parties compelled to answer by service, by publication, or by both. The bill then asks for "judgment against the New Orleans, Baton Rouge and Vicksburg Railroad Company for the amount of said coupons so as aforesaid due and alleged to be held by the complainant, and that the said lands hereinbefore described be held subject to the mortgage to secure the payment of said bonds and coupons as hereinbefore set forth and that said mortgage be recognized and enforced, and that said lands be sold to pay and satisfy the amounts due to complainant." And the bill then prays for process, for publication, etc.

A copy of the act of mortgage sued upon is found at pp. 11 to 14, and at pages 16 to 17 are certain orders from the Land Department dated November 29th, 1871. At pp. 18 to 19 is found a copy and sample of one of the bonds sued upon. It will be noticed, by reference to page 18, tenth line from the bottom, that the words "by Act of Congress" seem to have been inserted in the bond, *but there are no such words in the description in the act of mortgage.*

None of the defendants named in the bill ever appeared in the case, except the New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, trustees of the Land Grant Mortgages of New Orleans Pacific Railway Company. These parties filed their general demurrer June 30th, 1886, found at pp. 28 and 29, which was duly argued and overruled in September, 1886 (p. 30). "Judgment *pro confesso*" appears to have been entered August 4th, 1886, against the New Orleans, Baton Rouge and Vicksburg Railroad Company, Union Trust Company of New York, and S. D. McEnery, Governor of Louisiana. The demurrer having been overruled, as above stated, in September, 1886, the answer of the New Orleans Pacific Railroad Company and of John F. Dillon and Henry M. Alexander, trustees, was filed October 2d, 1886, pp. 31 to 38. It admits the incorporation of the New Orleans, Baton Rouge and Vicksburg Railroad Company by the Act of 1869, refers to that Act for the enumeration of the powers of that corporation and does not admit the averments in the bill of complaint in that behalf, except so far as said averments truly state the powers conferred by said act of incorporation. The respondents aver that by that act of incorporation it is provided that the said First Mortgage bonds and the mortgage securing the same contemplated by said act should be a lien only to the extent of $12,500 per mile upon each and every mile of the aforesaid main line and branches of

said railroad within the State of Louisiana, including the right of way, road bed, rails, depots, stations, shops, machinery, tools, engines. cars and all real and personal estate within the State of Louisiana, *appurtenant to or necessary for the operation of* said main line and branches of railroad owned by the Company at the date of the said mortgage, or which might be acquired by it thereafter, and all the corporate franchises and privileges of the said Company granted by the State of Louisiana, relative to the *construction, operation and use* of said railroad within the State of Louisiana, and the respondents aver that the power thus given and limited to make and execute the said first mortgage did not authorize the execution of any mortgage which should cover or embrace any lands which might thereafter be acquired by said Company by virtue of any grant of Congress to that effect, except so far, if at all, as if said lands should be actually used and occupied by said railroad for its track and for the actual operation of trains, and for stations and depot grounds. They deny that the said instrument of mortgage set out in the bill of complaint or therein referred to, dated the first day of October, 1870, either *did or legally could* embrace the 679,287 64-100 acres of land or any part thereof, which were, on or about the 3d day of March, 1885, patented by the United States to the New Orleans Pacific Railway Company, or the lands or any part thereof which, by the 22d Section of the Act of Congress of March 3d, 1871, were granted, as in said Act provided, to the New Orleans, Baton Rouge and Vicksburg Railroad Company. The respondents aver that they have no knowledge or information sufficient to form a belief, and therefore deny that on the first day of October, 1870, or at any other time, the New Orleans, Baton Rouge and Vicksburg Railroad Company authorized by due corporate resolution or otherwise the execution of the bonds mentioned in the bill of complaint, to-wit., bonds for $1,000 each,

bearing date 1870 and payable on the first day of October, 1910, with coupons thereto attached, and with recitals specified and contained in said bill of complaint, or in like manner or in any manner, authorized the execution of the said alleged mortgage of October 1, 1870, to the Union Trust Company of New York, to secure the said bonds and coupons, and defendants *require strict proof of said allegations*, and each of them contained in said bill of complaint. They especially deny that the said corporation ever authorized the mortgaging of any land grant, and the lands thereof by the act or instrument of October 1, 1870, set up in the bill. They make other allegations at p. 32, asking for strict proof of the authorization and execution of said mortgage of 1870. They also require strict proof of its *recordation* according to law, and they aver that if it was duly recorded it has never been *reinscribed* as required by the laws of Louisiana within ten years next succeeding its original registry in any of said parishes, nor until after said mortgage mentioned in the bill of complaint executed by the New Orleans Pacific Railway Company to Dillon and Alexander, trustees, had been duly executed and recorded according to the requirements of the laws of the State of Louisiana in that behalf. They specially deny that the New Orleans, Baton Rouge and Vicksburg Railroad Company, by the said act of mortgage of October 1, 1870, mortgaged and hypothecated, or could legally do so, to any future holder or holders of the said bonds or coupons or any part of the same, all the property and rights of any kind owned by said Company at the date of said mortgage, or which it might thereafter acquire. They deny that if the said mortgage of 1870 was executed as alleged, or recorded as alleged, the said New Orleans, Baton Rouge and Vicksburg Railroad Company could not sell, assign, transfer or encumber said property so described, or any part thereof, and especially deny that it could not sell,

assign or transfer any rights which it acquired under and by virtue of the 22d Section of said Act of Congress of March 3, 1871, except subject to said mortgage as alleged in the bill of complaint in that behalf. They also traverse the allegations of the bill as to the execution and signature of the bonds and coupons and the making and the execution of the mortgage, and the adoption of resolutions such as are alleged in the Bill of Complaint to have been adopted by the Board of said New Orleans, Baton Rouge and Vicksburg Railroad Company, or the Company itself, and whether the said Company did place the said bonds on the market or offer the same for sale, or disposed of any part thereof for a valuable consideration. They admit the passage of the Act of the Legislature of Louisiana of December 11th, 1872, being No. 100 of the Session of 1872, referred to in the bill, and they refer to that Act for a fuller statement of its provisions, and they say that said Act referred to the land grant made by the 22d Section of the said Act of Congress of March 3d, 1872, and provided for the giving up of the scheme of second mortgage bonds to be made by the said Company as contemplated by the Act of 1869, incorporating the New Orleans, Baton Rouge and Vicksburg Railroad Company, and authorized first mortgage bonds to be issued by said Company at the rate of $30,000 per mile to be a first lien on the real and personal property and all lands acquired by the Act of Congress or otherwise, and they aver that said Act exhibits the understanding alike of the New Orleans, Baton Rouge and Vicksburg Railroad Company and the Legislature of Louisiana, that no mortgage on said lands was ever contemplated or authorized by said Act of 1869, incorporating the said Company, or was ever established by said Act of mortgage of October 1, 1870. Defendants admit the passage of the Act of Congress of May 2d, 1872, but refer to the said Act for greater certainty as to its provisions and effect.

They deny that the grant made by the Act of Congress of March 3d, 1871, particularly by the 22d Section thereof, was a present grant in such sense as to vest in the New Orleans, Baton Rouge and Vicksburg Railroad Company title to the lands granted without further acts to be done by the grantee or its assigns as hereinafter set forth, and deny that said lands became and were immediately subject to the said alleged mortgage of 1870. They have been informed that on or about November 11, 1871, the New Orleans, Baton Rouge and Vicksburg Railroad Company filed some map of the *general route* of its road in the General Land Office at Washington, but of the time when and particulars of which they are not advised and require proof thereof; but they aver that said railroad company never filed in the Department of the Interior at any time, any map of *definite location* of the line of their said railroad or any part thereof, or any map of definite location whatever, and they aver that said Company never made any *definite* location of its line of railroad, or any part thereof, or ever built or constructed any part of its authorized lines of railroad. Respondents aver that they have no knowledge or information sufficient to form a belief and therefore deny that on the faith of said Acts of Louisiana and of the said Acts of Congress, and of the action taken thereon with respect to said bonds and mortgage, the plaintiff has, in good faith and for a valuable consideration, acquired, and now holds two of said bonds and coupons thereto attached, as alleged in the bill of complaint. The respondents admit that on or about the 5th day of January, 1881, and not on the 5th day of January, 1880, as alleged in the bill of complaint, said New Orleans, Baton Rouge and Vicksburg Railroad Company executed to the defendant, the New Orleans Pacific Railway Company, in due form, a deed of conveyance, granting and conveying to the said last mentioned railway company all the right, title and interest of the

said New Orleans, Baton Rouge and Vicksburg Railroad Combany, its successors and assigns, in and to a certain grant of public lands made to the said Company by an Act of Congress of the United States, approved March 3d, 1871, which said conveyance was duly executed by said grantor Company, and received and accepted by the grantee Company, and was subsequently duly ratified by the stockholders of the said grantor Company. They deny that said sale and transfer to the New Orleans Pacific Railway Company was made subject to the said alleged mortgage of October 1, 1870, and that said lands sold and transferred were acquired by said New Orleans Pacific Railway Company, subject to said mortgage. The respondents then proceed to show that the New Orleans Pacific Railway Company was incorporated in February, 1876 (Act No. 14 of 1876 and amendments thereto) to construct a railroad from the City of New Orleans through the State of Louisiana to a connection with the Texas and Pacific Railroad at Shreveport. That prior to 1880 the New Orleans Pacific Railway Company had built and graded but a small part of its road, and the New Orleans, Baton Rouge and Vicksburg Railroad Company had never graded or built any portion of its road, and was unable to do so; that in 1880, the New Orleans Pacific Railroad Company found that it would be enabled to raise means to construct its road provided it should be able to acquire any existing right which the New Orleans, Baton Rouge and Vicksburg Railroad Company would have under the 22d Section of the Act of Congress of March 3, 1871; that the said deed of January 5th, 1881, was executed in pursuance of contracts previously made therefor, and the Department of the Interior was notified of said transfer to the New Orleans Pacific Railway Company; that on the 21st February, 1881, the Commissioner of the General Land Office recognized the transfer to the New Orleans Pacific Railway Company to be complete, on the faith of which the

said New Orleans Pacific Railway Company proceeded with the construction of said road as required by the Act of Congress of the United States, and on the 27th October, 1881, duly filed in the Department of the Interior a map of the *definite* location of a part of its road, and on the 17th of November, 1882, likewise duly filed with the Department of the Interior a map of *definite* location of the rest of its road between New Orleans and Shreveport in all respects as required by the Act of Congress. That commissioners were appointed by the Secretary of the Interior to examine the road so constructed by the New Orleans Pacific Railway Company, who reported that the same had been constructed in full compliance with the Acts of Congress in that behalf, which reports were laid before the Secretary of the Interior, and on March 13th, 1883, that officer found and decided that the New Orleans Pacific Railroad Company had the right to receive the lands under the 22d Section of said Act, and that patents for such lands as might have been earned by the said Company should be issued to it, which finding and decision was laid before the President of the United States, who on the 16th day of March, 1883, as authorized by and conformably to the said Act of Congress of March 3, 1871, endorsed the same: "This recommendation approved. Chester A. Arthur." The respondents admit that by reason of the said construction of said road by the said New Orleans Pacific Railway Company, whereby it earned said lands, on or about the 3d March, 1885, patents of the United States for about 679,287 64-100 acres of lands were, under the orders of the Secretary of the Interior and of the President of the United States, issued to the said New Orleans Pacific Railway Company. Defendants aver that the said New Orleans, Baton Rouge and Vicksburg Company never at any time filed any map of *definite* location of the line of its road or any part thereof; that the maps filed as aforesaid by the New

Orleans Pacific Railway Company on the 27th October, 1881, and the 17th November, 1882, were the first and only maps of definite location of said road ever filed in the Department of the Interior; that as they are advised, the legal title to all of said lands in place granted by the 22d Section of the Act of March, 1871, remained in the United States at least until the said maps of definite location were filed, if not until the said patents were issued therefor on the 3d day of March, 1885, and as to the indemnity lands the title remained in the United States until they were actually selected, which selections were made by the New Orleans Pacific Railway Company in pursuance of its definite location and the construction of its road, and so these respondents say and aver that the title to no part of the lands so patented ever vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company as alleged in said bill of complaint, or otherwise, nor was any title to it ever recorded in Louisiana, nor did said last named Company ever acquire any equity by reason of the construction of said road or otherwise, to call on the United States to convey to it the title to said lands or any part thereof. And these defendants aver and say that the title to said lands so patented and to all of them, proceeded from the United States *directly* to the New Orleans Pacific Railway Company, and was held by it in its own right absolutely and not as trustee for the New Orleans, Baton Rouge and Vicksburg Railroad Company, or its mortgage bondholders, or the complainant in this suit. These defendants aver that said lands upon which the bill seeks to establish a lien were used by said New Orleans Pacific Railroad Company to enable it to construct its said road, and were used and appropriated in part payment of the cost of constructing same.

Defendants further aver that after the construction of said road and in order to obtain said patents, the New Orleans Pa-

cific Railway Company was obliged to pay and did pay large expenses for surveying, selecting and conveying of said lands amounting to many thousands of dollars. They traverse the allegation of the bill in regard to the execution on the 28th December, 1870, of an alleged mortgage in favor of the Governor of Louisiana (p. 36); they further state that they believe it is true that on the 4th September, 1872, said New Orleans, Baton Rouge and Vicksburg Railroad Company executed a certain mortgage in favor of the Union Trust Company of New York, but deny that it was on the same property embraced in the mortgage of October 1, 1870; that said mortgage of 1872 was styled, as alleged in the bill of complaint, "a mortgage to secure Seven Per Cent. *Land Grant* and Sinking Fund Gold Bonds," and these defendants, while not admitting the validity of the said mortgage, and not being advised of how many of said bonds are outstanding thereunder, insist that said mortgage shows on its face and by its terms that said Railroad Company had not theretofore made a mortgage on the said land grant by the act of mortgage of October 1, 1870, or otherwise, and that said alleged mortgage of 1872 was the first mortgage which said Company had undertaken to make, pledging or hypothecating said land grant claimed under said Act of Congress of March 3, 1871. These defendants further admit that by the acts of mortgage dated April 17, 1883, and January 5, 1884, the New Orleans Pacific Railroad Company made and executed in favor of the defendants John F. Dillon, and Henry M. Alexander, of the City of New York, as trustees, a land grant and sinking fund mortgage of all the lands acquired by the New Orleans Pacific Railway Company from the United States by virtue of its construction of the said railroad, to secure the payment of its land grant and sinking fund bonds limited to an issue of $2.50 per acre, as will more fully appear by reference thereto. These defendants deny that the said mortgage in favor

of the said Dillon and Alexander is subsequent and subordinate to the alleged mortgage so as aforesaid made and executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company of October 1, 1870. Said Dillon and Alexander further answering say that said bonds issued in pursuance of said acts of mortgage of April, 1883, and January, 1884, are outstanding in the hands of third holders for value, except so far as same have been actually exchanged in pursuance of the provisions of said acts of mortgage for the lands so patented by the United States, March 3, 1885, to the New Orleans Pacific Railway Company; they further show that the legal title to said lands so patented as aforesaid passed from the United States to the New Orleans Pacific Railway Company in the manner hereinbefore shown, and by said acts said lands were mortgaged to the said trustees, Dillon and Alexander, for the benefit of the said trust created in favor of the holders of said bonds executed by the New Orleans Pacific Railway Company, and that by reason of the actual construction of the said road by the New Orleans Pacific Railway Company, whereby these lands were earned by it, and by its means, its rights and equities and those of Dillon and Alexander, trustees, are superior to any right or equity of said complainant, who, if the facts alleged in said complaint are true, which these defendants deny, has for fifteen years slept upon his rights, and during the period when said railroad was being constructed by said New Orleans Pacific Railway Company never set up any claim under said mortgage, nor notified said Company or said trustees of any claim thereunder, and by his laches has disentitled himself to any relief as against said New Orleans Pacific Railway Company, or as against said Dillon and Alexander.

[NOTE: The late clerk of the lower court was a confirmed invalid at the time the transcript was made, and soon after died. The documents are not well arranged. Repeated efforts were

made to induce him to improve the arrangement of the transcript. It will be found to contain, either in itself, or by the stipulations filed, all that is needful for a decision of the case, and we will endeavor to refer to the pages in such a way as not to put the Court to inconvenience.]

On the 13th October, 1886, the said respondents, the New Orleans Pacific Railway Company and Dillon and Alexander, filed their *cross-bill* in the case, which will be found at pp. 78 to 80 of the transcript. The complainant Parker, the New Orleans. Baton Rouge and Vicksburg Railroad Company, the Union Trust Company of New York, and Samuel D. McEnery, who was Governor of Louisiana at the time, were made defendants to this cross-bill. The cross-bill sets forth in the usual form the general tenor of the bill of complaint (pp. 79 to 81). In its second paragraph it gives the history of the New Orleans Pacific Railway Company, its acquisition of the rights of the New Orleans, Baton Rouge and Vicksburg Railroad Company, the grant of public lands made by the Act of Congress of March 3d, 1871, the construction by the New Orleans Pacific Railway Company of its road from New Orleans to Shreveport, its filing of the said maps of definite location, its completion of the road, the examination by the officers of the Government of the United States, their decision that the New Orleans Pacific Railway Company had earned the lands contemplated by the land grant, the issue of the patents to it by the President of the United States for 679,287 64-100 acres of land, and in brief, reiterates all the allegations on this behalf which were made in the answer. They show that said lands upon which the bill of complaints of said Parker seeks to establish a lien for and on behalf of the said 500 bonds alleged by him to be outstanding under the alleged mortgage of October 1, 1870, were used by said New Orleans Pacific Railway Company to enable it to construct its said railroad, and

were used and appropriated in part payment of the cost of constructing the same, and by the issue of bonds secured by mortgage thereon. They also show that after the construction of the said road, and in order to obtain said patents, the New Orleans Pacific Railway Company was obliged to, and did pay, large expenses for certifying, selecting and conveying said lands and for taxes thereon, amounting to about $40,000. They then set up the acts of mortgage dated April 17th, 1883, and January 5th, 1884, made by the New Orleans Pacific Railway Company in favor of John F. Dillon and Henry M. Alexander; they aver this mortgage to be the first and only lien on said lands and that the bonds, issued at the rate of $2.50 per acre with reference to said lands, are outstanding in the hands of *bona fide* bondholders for value, except so far as they have been exchanged for lands.

They further show that pursuant to the provisions of the said mortgages made by the New Orleans Pacific Railway Company, the cross-complainants are offering the said patented lands for sale under and pursuant to the trust, and are continually embarrassed in and prevented from selling same and from executing the duties of said trust and realizing the true value of said lands by reason of the claims set up by said Parker, complainant in said cause, namely, that said mortgage of October 1, 1870, alleged to have been made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, is a prior lien on said patented lands, and the said claim of said Parker on behalf of himself and all other holders of the alleged $500,000 of bonds averred to be outstanding under and by virtue of said mortgage of October 1, 1870, is a cloud on the title of cross-complainants as patentees and mortgagees, and inflicts continual and irreparable injury on them and each of them. That as said mortgage of October 1, 1870, and the said outstanding bonds secured thereby do not mature for many years, your Orators will continue to be

embarrassed and injured thereby irreparably and for this long period of time; that the complainant Parker sues on behalf of himself and all other holders of bonds issued under said mortgage of 1870, and your Orators are advised and believe that he represents upwards of 200 of said bonds or some association of persons holding that number; that each alleged holder of the 500 bonds averred to be outstanding, other than said Parker, may bring suit similar to his against your Orators and thus involve them in a multiplicity of suits; that a court of equity only can afford a remedy to your Orators and remove and relieve against said cloud, and that your Orators have a right to file this their cross-bill to that end. In the third paragraph of the cross-bill the cross-complainants aver as to said claim of said complainant Parker, namely, that said alleged mortgage of October 1, 1870, is a lien on said lands patented to the New Orleans Pacific Railway Company, and that said lien is prior to that of the mortgage on said lands made by the New Orleans Pacific Railway Company to Dillon and Alexander, trustees, as follows:

(A) The said New Orleans, Baton Rouge and Vicksburg Railroad Company, in October, 1870, had no power to mortgage by said instrument of October 1, 1870, any land grant or lands granted thereby made by the Act of Congress of March 3d, 1871.

(B) Said New Orleans, Baton Rouge and Vicksburg Railroad Company never *authorized* the mortgaging by the instrument or Act of October 1, 1870, of any land grant or lands granted thereby, and especially the land grant under said Act of Congress of March 3d, 1871.

(C) Said mortgage of October 1, 1870, was never recorded and reinscribed in such way as to preserve the lien claimed by said Parker, even if such lien there was, which is denied.

(D) The said mortgage of October 1, 1870, does not allude to, describe, include, cover, hypothecate or affect the land grant

made by said Act of Congress of March 3, 1871, or the lands granted thereby.

(E) The New Orleans, Baton Rouge and Vicksburg Railroad Company never filed any map of *definite* location, never made any such definite location and never built any road, and said lands were finally earned as aforesaid by the location and construction of said road by the New Orleans Pacific Railway Company.

(F) In any event the coupons of the bonds which said Parker claims to hold, so far as they have matured up to and including April 1, 1881, were extinguished by prescription of five years under the laws of Louisiana. (This has been withdrawn.)

(G) The said complainant and his predecessors in title and the other holders for whom he sues have slept upon the alleged rights set up in his bill for fifteen years, and during the time the New Orleans Pacific Railway Company was acquiring said land grant and making definite location of its road and building the same, no holder of said bonds issued under the mortgage of 1870, or the trustee of said mortgage, made any claim of lien on the said land grant, or the lands granted, or notified the said New Orleans Pacific Railway Company, nor said Dillon and Alexander, of any said claim, and the said Parker and any other holders of said bonds and their trustee, the Union Trust Company, of New York, have disentitled themselves to any relief in any event as against the New Orleans Pacific Railway Company, the said Dillon and Alexander, the trustees in said mortgage of 1883 and 1884.

They ask for certain orders of publication, etc., and for a decree as against all the other parties to the cause, to remove the cloud cast upon the title to the said lands by the pretensions with reference to the mortgage of October 1, 1870, and that it be decreed

that the said mortgage does not embrace the land grant lands in question in the cause.

On the 27th October, 1886, three of the defendants to the cross-bill, viz: the New Orleans, Baton Rouge and Vicksburg Railroad Company, the Union Trust Company of New York, and Samuel D. McEnery, were ordered to appear, plead, answer or demur to said cross-bill under the provisions of the statute, and this order was directed to be published in the Shreveport Journal, and if practicable to be served upon the said defendants (p. 86). By reference to pages 87 and 88, it will be seen that the order to plead was published in the Shreveport Journal and served upon Samuel D. McEnery. On the 22d November, 1886, the complainant Parker appeared to the cross-bill and filed a general demurrer thereto (Transcript, p. 88). On the 24th December, 1886, Walter A. Hamlin, of New York, came into the case by petition (found at pp. 89 and 90), claiming to be a holder of five bonds of the same issue as those sued upon by the complainant Parker, and by order of the Hon. D. A. Pardee, Circuit Judge, was admitted as a complainant in the cause (Transcript, p. 90). By stipulation found also at p. 90, dated March 23d, 1887, it was agreed between the solicitor for Hamlin and the solicitors for the respondents that the cause should stand and be considered as if he had been one of the complainants in the original bill, and that the pleadings of complainant Parker should be considered as Hamlin's also, and the pleadings of the defendants, the New Orleans Pacific Railway Company and of Messrs. Dillon and Alexander, should apply equally to said Hamlin, and "the said defendants should have leave to withdraw from their answer and cross-bill all exception, plea and defense of prescription of five years, and allegations respecting the same." By this stipulation Hamlin not only adopted the original bill of complant but the demurrer to the cross-bill, and made an agreement with reference to the

said cross-bill, and also adopted the replication which is found at page 78. By reference to page 39 of transcript, it will be seen Hamlin's solicitor also appeared at taking of testimony and made another stipulation as to the cross-bill. On the 28th March, 1886, as appears by the minutes on p. 98 of the transcript, the demurrer to the cross-bill was sustained and the cross-bill was dismissed. It will be observed that the court thus sustained the demurrer of the complainant Parker, which had also been formally adopted and submitted by the other complainant Hamlin and dismissed the cross-bill *in toto*. In the opinion of the court the cross-bill was unnecessary and improper as to all the parties made defendant by and in said cross-bill. It was, therefore, impossible to take any further proceedings upon the cross-bill. No further proceedings therefore were taken thereon against the New Orleans, Baton Rouge and Vicksburg Railroad Company, nor against the Union Trust Company, nor against Samuel D. McEnery. It would have been a vain thing to attempt to proceed further against them, to ask for a decree *pro confesso*, or attempt to make such decree final, when the Court had dismissed the bill *in toto*, as a bill not useful or proper to be filed. And this will further appear by reference to p. 99, where it will be found that a like decree was made and signed in open Court February 28, 1888, dismissing the cross-bill, *in toto*, and a memorandum of this fact is contained at the end of the decree in favor of Hamlin, foot of p. 102.

In June, 1887, with consent of both complainants, and with leave of the Court, the New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander, the respondents, filed their supplemental answer, setting up the passage by the Congress of the United States of the Act of February 8th, 1887, of which a copy is annexed, the acceptance of said Act by the New Orleans Pacific Railway Company and its agreement to dis-

charge all the duties and obligations which had been imposed on the New Orleans, Baton Rouge and Vicksburg Railroad Company by the Act of March 3d, 1871, and the issuance by the Secretary of the Interior of his orders thereon, also annexed to said supplemental answer. This supplemental answer, the Act of Congress of February 8th, 1887, therein referred to, and the letter from the Department of the Interior of June 6th, 1887, together with the maps showing the New Orleans Pacific Railway as built, and the general location of the New Orleans, Baton Rouge and Vicksburg Railroad as projected are found at pp. 92-97 of the transcript, inclusive, and the documents and maps were put in evidence on final hearing.

The cross-bill having been thus disposed of, *in toto*, in March, 1887, on the 26th October, 1887, the cause came on for final hearing upon the testimony which had been taken by consent and the documents offered by the respective parties, viz: the complainant Parker, the complainant Hamlin and the respondents, the New Orleans Pacific Railway Company and John F. Dillon and Henry M. Alexander. A note of evidence or statement of evidence adduced in the cause is found at pp. 25 and 26. The complainant Parker offered what is described on p. 25, the co-complainant Hamlin offered the same and in addition his five bonds which it was stipulated were of the same issue as those held by the defendant Parker and the respondents offered the evidence listed at p. 26 and printed at pp. 38 to 97 inclusive.

As already remarked, the late clerk of the lower court has not arranged this testimony in such a skilful and consecutive manner as could have been desired, but the documents will be found at the pages which we indicate, and they will be found to have been offered in evidence on the part of the respondents and filed on the said date of final hearing and argument, October 26th,

1887. Stipulations have also been filed explaining the arrangement and correcting sundry errors of the transcript.

The testimony of Edward B. Wheelock, on behalf of the respondents, taken by consent, is found at pp. 34 to 43 inclusive, and the mass of documents testified to by him and offered in evidence in connection with his testimony extend from p. 43 to p. 97. Mr. Wheelock established by his testimony beyond dispute the facts set up in the answer, as well as in the cross-bill, with reference to the construction of the railroad from New Orleans to Shreveport by the New Orleans Pacific Railway Company. He states without any contradiction, and no contradiction can be made, that the bonds secured by the acts of mortgage made by the respondent, the New Orleans Pacific Railway Company, to the respondents, Messrs. Dillon and Alexander, were issued under that mortgage to the extent of $2 50 per acre, which upon the number of acres mentioned in the bill would amount to upwards of $1,500,000; that in order to construct this New Orleans Pacific Railway under the circumstances that existed in Louisiana at that time, it being impossible to obtain the necessary capital in Louisiana, it was necessary to make an agreement with the American Railway Improvement Company, which was the construction company that built the road, that it should have the proceeds or benefit of the land grant which is in question in this cause, and the right to which had been assigned to the New Orleans Pacific Railway Company. This agreement was carried out by the issue of the bonds under the acts of mortgage, mentioned in the bill and in the answer, of April 17th, 1883, and January 5th, 1884. They were turned over to the American Railway Improvement Company in settlement of their contract for the construction of the railway. The question of definite location of this railroad from New Orleans to Shreveport is also explained by Mr. Wheelock (pp. 40-42) and the documents offered, introduced and filed in

connection with his testimony. The dates of definite location were fixed by the Department of the Interior and approved by President Arthur as the date of the actual construction and completion of this New Orleans Pacific Railway from New Orleans to Shreveport, in 1881 and 1882. It is also established by Mr. Wheelock's testimony, at page 42, and there will be no dispute in regard to this proposition, that the New Orleans, Baton Rouge and Vicksburg Railroad Company never built any railroad whatever in Louisiana. The witness further shows that the Act of Congress of February 8th, 1887, had been accepted by the New Orleans Pacific Railway Company and said acceptance recognized by the Department of the Interior. He also testified without any dispute, that the New Orleans Pacific Railway Company had been obliged to pay, and did pay, in order to obtain the patents for the land grant lands which are described in the bill of complaint, large expenses for surveying, solections and conveying of the lands, amounting to upwards of $20,000, and at the time this testimony was taken (March, 1887) had paid from ten to twelve thousand dollars of taxes on these lands. The documents offered and received in evidence in connection with Mr. Wheelock's testimony, will be found in the transcript as follows: The quit claim, deed or assignment of the right, title and interest of the New Orleans, Baton Rouge and Vicksburg Railroad Company in the land grant of 1871 to the New Orleans Pacific Railway Company, p. 43; the acceptance of the same at p. 44, and the ratification of the said transfer by the directors and stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company at pp. 45-48: the letter of the Secretary of the Interior, approved by President Arthur, at pp. 48 to 51. By this, Secretary Teller (p. 50) decided that the New Orleans Pacific Railway Company had earned the lands in question by the building of 328 miles of road which had been ex-

amined and found to have been properly constructed, and recommended that patents for such lands as might have been earned with reference to that portion of the road extending from Whitecastle to Shreveport should be issued to the *New Orleans Pacific Railway Company.* This decision of the Secretary was approved by President Arthur (p. 50). The next document, found at pp. 51-53, is a report by L. Harrison, Acting Commissioner of the General Land Office. It shows that no map of definite location of any railroad concerned in the premises was filed prior to the construction of the road, and fixes the actual construction of the New Orleans Pacific Railway as the date of definite location. It may here be remarked that the same dates were adopted by the Act of Congress of February 8, 1887. By the next document, found at p. 53, the New Orleans Pacific Railway Company accepts these dates of definite location. The document found at pp. 54-55 is an acceptance by the New Orleans Pacific Railway Company of the Act of Congress of February 8, 1887. The next documents, extending from pp. 55 to 77, are the mortgage acts made by the New Orleons Pacific Railway Company to John F. Dillon and Henry M. Alexander, mentioned in the pleadings and offered in evidence. At pp. 92-97, inclusive, are found as offered in evidence and filed October 26, 1887, at the final hearing, the said Act of Congress of February 8, 1887, and the Exhibit S[1] and H, being the letter from the Department of the Interior, General Land Office, and the maps offered in connection therewith. It was agreed in the statement of evidence, p. 26, that the list there found shows the date of the recordation of the land grant mortgages of the New Orleans Pacific Company to be as follows in all the parishes concerned: The original mortgage of April 17, 1883, was recorded in all the parishes concerned in April and May, 1883, and the supplemental mortgage of January 5,

1884, was recorded in February, 1884, in the same parishes. As for the recordation, or registry, as it is sometimes called in Louisiana, of the complainant's mortgage of 1870, the statement of evidence and the different papers offered by complainants (pp. 22 to 25, inclusive) together with the stipulation which has been made between the counsel in regard to the transcript, show that the mortgage of 1870 was recorded in the Parishes of De Soto, St. Landry, Natchitoches and Rapides in 1870, and in the Parishes of Calcasieu, Sabine and Grant for the first time in 1885. No recordation in any other parish of the mortgage of 1870 is shown.

A number of stipulations have been made to decrease the bulk both of the manuscript and printed record. By the one found at p. 109 and p. 112, it is agreed that the patents offered and referred to in the cause need not be copied in the transcript at all, but a copy of one (which is found at pp. 109-111) may be inserted and used as a sample of the said patents. The lists of selections are also omitted from the printed transcript by consent (pp. 112-115), but may be referred to by either party. Acts of Congress and State Statutes offered in evidence are also agreed to be omitted from the transcript and may be referred to on appeal in the printed volume of the laws. The minutes at pp. 98-99 show that the cause having been heard on the merits on the 26th October, 1887, was taken under advisement.

On the 20th January, 1888 (p. 99), a decision appears to have been made in favor of complainant and intervenor, the word "intervenor" being used apparently to characterize the co-complainant Hamlin. On the 20th February, 1888, as appears by the minutes and decrees found at pp. 99-103, a decree was made and signed in open Court dismissing the cross-bill *nunc pro tunc*, and a decree rendered in favor of John D. Parker, complainant, against the New Orleans, Baton Rouge and Vicksburg Railroad Company for two several sums of $1200 each, amount of thirty

coupons on each of the two bonds sued upon, with 5 per cent. interest from October 1, 1885. By this decree it was further ordered, adjudged and decreed that the mortgage executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company on the 1st October, 1870, of which an authentic copy had been filed in evidence, to secure the payment of its First Mortgage Construction Bonds and the coupons thereon, including the coupons above mentioned, covers and embraces certain lands granted by the United States to said Company in aid of the construction of its branch line from New Orleans to Baton Rouge, and thence by way of Alexandria to connect with the line of the Texas Pacific Railway, for which patents were issued by the United States to the New Orleans Pacific Railway Company, assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, which lands are particularly described in lists No. 1 and No. 3 so patented, issued by the United States Land Office at New Orleans, and in lists Nos. 2 and 4 of lands so patented to it by the United States Land Office at Natchitoches, which lists are filed in evidence by complainant. It is then further ordered, adjudged and decreed that said mortgage (meaning the mortgage sued upon, of October 1st, 1870), exists in favor of said John D. Parker, as holder and owner of said coupons, and to secure payment of same as a first mortgage on said lands *prior to all claims and mortgages set up by respondents herein.* It is then further ordered, adjudged and decreed, that there be judgment in favor of the said John D. Parker and against all the defendants herein, recognizing his mortgage rights as hereinbefore set forth. And it is further ordered, adjudged and decreed that said lands hereinbefore described (amounting, as will be remembered, to over 600,000 acres) shall be sold free of all liens, mortgages and encumbrances whatever, to pay and satisfy said sum of $2,400 with 5 per cent. per annum interest

from October 1, 1885, and all costs. A decree was also rendered and signed (pp. 101-102) in favor of Hamlin, the co-complainant, of the same tenor, except that the amount of the decree for coupons held by him is $6,000 with 5 per cent. interest from October 1, 1885. By this decree it is likewise ordered, adjudged and decreed that the mortgage executed by the said New Orleans, Baton Rouge and Vicksburg Railroad Company, October 1, 1870, securing the payment of its First Mortgage Construction Bonds and the coupons thereon, including the coupons of Hamlin herein mentioned, covers and embraces the same lands granted by the United States to said Company in aid of the construction of its railway described in the same manner, for which lands the same patents were issued by the United States to the New Orleans Pacific Railway Company, assignee of said New Orleans, Baton Rouge and Vicksburg Railroad Company, which lands are described in the same lists or exhibits mentioned in the decree in favor of Parker. It was in the same manner further ordered, adjudged and decreed that the same mortgage of 1870 exists in favor of said Hamlin as the owner and holder of said $6,000 of coupons and to secure payment of same as a first mortgage on said lands prior to all claims and mortgages set up *by the respondents herein.* It was further ordered, adjudged and decreed that there be judgment in favor of said Hamlin and against all the defendants recognizing his mortgage rights as hereinabove set forth. It was then ordered, adjudged and decreed that the same lands and all of them should be sold free and clear of all liens, mortgages and encumbrances whatever to pay and satisfy said sum of $6,000 with 5 per cent. per annum interest from October 1, 1885, and all costs. And it was further recited that the demurrer to the cross-bill in this cause having been heretofore maintained, the same had been this day dismissed by decree entered, *nunc pro tunc,* as of January, 1887, thus showing that upon the demurrer filed

by Parker and joined in by Hamlin, the cross-bill had been dismissed as we have stated before, in the early part of the year 1887, as against all the parties thereto. It should here be observed that on the settlement of said decrees and prior to their rendition, the respondents and appellants in this cause filed with the Judge in open court, a respectful protest against the making of more than one final decree. This paper, omitted by the late clerk, is brought up by stipulation and comes in at p. 99. It seemed to us plain that there was but one cause; that, while it had been begun by John D. Parker, Hamlin had been admitted by the Court as a complainant, with the same mortgage rights and a considerably larger amount at stake; that from the moment Hamlin came in under o ders of the court and adopted a bill which had been filed on behalf of all persons similarly situated, and certainly from the time he adopted all the pleadings of Parker including the demurrer to the cross-bill, it was but right and proper that there should be but one final decree settling the rights of the parties. The protest of the respondents however was not held to be valid, and their request that there should be but one decree being refused, the decrees above specified were rendered. As soon as rendered, and on the same day, in open court, an appeal was granted (p. 103) to this Court, to the respondents, upon their allegation that there was error to their prejudice in said decree in favor of Parker, and in said decree in favor of Hamlin, and also in the said decree sustaining the demurrer to the cross-bill, and dismissing the cross-bill. This appeal was granted to all the respondents from the said decrees and the whole thereof. Proper bond for a supersedeas was approved the same day in open court by the Judge and filed in open court, and, together with the order allowing the appeal, entered upon the minutes (p. 99). The bond given by the respondents and so approved, was made in favor of all the other par-

ties to the cause, and of each of them, and of course under the numerous decisions of this Court, no citation was necessary. Citations however were either waived or admitted by all parties, or served. The complainant Hamlin having departed this life, his administrator came in by petition, p. 97, and was made party by order of the Court, March 29, 1888.

Specification of Errors.

Respondents, appellants, filed with the transcript a specification of errors, as follows:

First. The court below erred in overruling the demurrer interposed to the bill of complaint herein.

Second. The court below erred in sustaining the demurrer to the cross-bill which was filed by these appellants.

Third. The court below erred in dismissing said cross-bill.

Fourth. The court below erred in rendering the final decrees in favor of the complainant Parker and the complainant Hamlin.

Fifth. The court below erred in adjudging the bonds and mortgage sued upon by complainant and co-complainant to be the acts and deeds of the New Orleans, Baton Rouge and Vicksburg Railroad Company.

Sixth. The court below erred in decreeing the mortgage sued upon by complainant and co-complainants to be a lien on the lands granted by the 22d Section of the Act of Congress of March 3, 1871, set forth in the bill.

Seventh. The court below erred in denying the claim of appellants that the mortgage made by the New Orleans Pacific Railway Company to Dillon and Alexander, trustees, is the first lien on the lands granted by the said 22d Section of the Act of Congress of March 3, 1871.

Eighth. The court below erred in holding that the claims of

the complainants (even if having any any force, which is denied) were not barred by the laches set up in the answer.

NINTH. The court below erred in denying to appellants the equities claimed in the answers and established by the evidence arising from the *definite location and building* of the railway by the New Orleans Pacific Railway Company, the earning by it of the lands in question, and the mortgaging of the lands to pay for the construction of the road and the expenditures by appellants for patents and taxes.

TENTH. The court below erred in denying the rights claimed by appellants under the Act of Congress of February 8, 1887.

To which may be added:

ELEVENTH. The court below erred in holding that the alleged mortgage of 1870 was recorded so as to affect the respondents, appellants, and required no reinscription.

TWELFTH. The court below erred in not rendering one final decree to settle the rights of the parties.

BRIEF OF ARGUMENT.

I.

We submit that the court below should have sustained our demurrer and dismissed the suit. The question whether the bill of complaint filed by Parker and adopted by Hamlin shows any cause of action as against us, the owner and mortgagees of the lands patented by the United States to the New Orleans Pacific Railway Company, March 3, 1885, is always present in the case for discussion. We have already set forth the allegations of the bill. We may properly refer here to some matters which it does not allege.

It does not allege that the parties to the mortgage of 1870 expected or had any reason to expect that any land grant would ever be made. It does not allege that after the passage of the

Act of Congress of March 3, 1871, the mortgagor of 1870 ever made a definite location of any railroad whatever or built any railroad at all, or undertook to make any selection whatever of any lands or paid any of the costs of surveying, selecting and conveying said lands under the Act of Congress of July 31st, 1876, Chap. 256, 19th Statutes, 121. There was not a single averment to show as matter of fact that the mortgagor of 1871 ever did anything to earn an acre of land or to acquire any title to an acre under the rules laid down in New Orleans Pacific Railway Company vs. The United States, 124 U. S. p. 124, and the cases there cited. Nor does the bill claim that the conveyance by that mortgagor of 1870, of its interest in the land grant of 1871, a conveyance made to the New Orleans Pacific Railway Company in 1881, was ineffective, or illegal, or fraudulent. Nor does the bill negative in any way the necessary conclusion from the logic of the situation that the definite location of a railway as contemplated by the 22d Section of the Act of 1871 must have been made by the New Orleans Pacific Railway Company and the road built by that company and the costs under the Act of Congress of 1876 paid by that company. else the patents would not have been executed and delivered in 1885. Nor does the bill allege, and indeed it could not allege, that the definite location of the railroad contemplated by the Act of Congress of 1871, and which location was fixed by the actual construction of the railroad by the New Orleans Pacific Railway Company *coincided with the general route* originally devised by the New Orleans, Baton Rouge and Vicksburg Railroad Company. Nor, does the bill display any interest in the question of foreclosing the mortgage of 1870 according to the law of Louisiana, which declares that the mortgage is in its nature indivisible; in other words, does not admit of partial execution, R. C. C. 1870, Articles 2109 (2115), 3282 (3249); but on the con-

trary, utterly ignores any sale of the mortgaged property by its description in the mortgage, and only asks for a sale of certain lands conveyed by the United States to the New Orleans Pacific Railway Company, and by that Company mortgaged to Dillon and Alexander.

Passing on from these considerations, it should be stated at once that the main question in the case at bar, whether the mortgage of 1870 sued upon by complainants bears upon or affects in any manner these land grant lands of the New Orleans Pacific Railway Company, was decided nearly two years ago in the negative, in the matter of this very mortgage. The case was that of the New Orleans Pacific Railway et al. vs. The Union Trust Company et al., reported in 41 Fed. Reporter, p. 717. The opinion in the case was delivered by the Hon. Don A. Pardee, Circuit Judge for the Fifth Circuit, and we beg leave to quote it as follows:

"PARDEE, J.—The question presented in this case is whether a mortgage granted by the New Orleans, Baton Rouge and Vicksburg Railroad Company, one of the complainants herein, on the 1st day of October, 1870, to secure an issue of bonds made by said company, bears upon and affects the lands thereafter upon the 3d of March, 1871, granted by the Congress of the United States to the New Orleans, Baton Rouge and Vicksburg Railroad Company and its assigns to aid in the construction of a railroad in [from] New Orleans and in connection with the Texas and Pacific Railroad at its eastern terminus at Shreveport, La. See Chapter 122, Acts Congress, 1871. In said act of mortgage the property claimed to be hypothecated and affected thereby covers the whole of the main line of the railroad of said company within the State of Louisiana, particularly describing and setting forth the same 'together with the rights of way, roadbeds, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, tenders and other rolling stock, also all real and personal estate within the State of Louisiana owned by the said company at the date of this mortgage or which may be acquired by it thereafter, appurtenant to, or necessary for, the operation of said main line of said railroad, or any of said branches connected with said main line, or to be connected therewith; also all other property, real and personal, of every kind and description whatsoever and wheresoever situated in the State of Louisiana which is now

owned or which shall hereafter be acquired by said company and which shall be appurtenant to or necessary for the operation of said main line of railroad or any of said branches, also the tenements, hereditaments and appurtenances thereunto belonging and all of the estate, right, title and interest, legal and equitable, of the said company and its successors and assigns therein, together with the corporate franchises and privileges of said company at any time granted or to be granted by the State of Louisiana relative to the construction, operation and use of said railroad within said State.

The general law of Louisiana is simple and well settled. 'Mortgages are strictly construed and will not be extended by implication.' Succession De Armas, 3 Rob. (La.) 342. 'To render a conventional mortgage valid it is necessary that the act establishing it shall state precisely the nature and situation of each of the immovables on which the mortgage is granted.' Rev. Civil Code, Art. 3306. 'A debtor may mortgage his whole present property or only a specific part, but in either case it ought to be expressly enumerated, as is said in the preceding Article.' *Id.* Art. 3307. 'Future property can never be the subject of a conventional mortgage.' *Id.* Art. 3308. 'The conventional mortgage when once established on an immovable includes all the improvements which it may afterward receive.' *Id.* Art. 3310. In State vs Railway Co., 3 Rob. La. 513, the Supreme Court of Louisiana said: 'It is clear that future property can never be the subject of a conventional mortgage,' and declared that a railway mortgage could not exist, or be made in derogation of the general hypothecary system of the Civil Code, without special legislative authority. Section 2396 of the Revised Statutes of 1870, provides that 'for the construction or repairs of any railroad, the Company may issue bonds * * * secured by mortgage upon the franchises and all the property' of the Company. Section 2427 provides, that 'any railroad company established under the laws of this State may, to secure the payment of any obligation contracted by the said Company for the construction of the road, mortgage their road in whole and in part, and such mortgage if made of the entire road shall bear upon the entire road though the same be not completed at the time the mortgage was made, and such may also be made to bind the appurtenances of said road, its warehouses, depots, water stations, locomotives, etc.' In the case of Bell vs. Railroad Co., 34 La. An. 785, the question was considered as to the power of a railroad company to mortgage, and the extent of the mortgage granted, and it was there held that 'the mortgage of a railroad, its lands, property, franchises, rights and appurtenances, with the buildings, structures and improvements, comprehends not

only the property *in esse* forming part of the organism or structural arrangements or the machinery and apparatus for the construction, maintenance or operations of the railroad, whether movable or immovable, but also such as shall be obtained or added during the existence of the debt." From these Statutes and decisions of the Court it seems clear that under the general laws of Louisiana the only after-acquired property that can be covered by a railroad mortgage is the after-acquired property forming part of the organism of the railroad, or, in other words, forming a part of the railroad and its appurtenances.

The charter of the New Orleans, Baton Rouge and Vicksburg Railroad Company as existing in 1868 and 1870 did not contemplate any land grant from the United States nor confer any special authority to accept, hold, or deal with such a grant and the power to make a first mortgage contains no reference to such a grant, but on the contrary seems to exclude the idea of any mortgage on such land, if granted. The power to mortgage and the lien of the mortgage, as granted in Sections 14 and 16 of the Act of 1869, are as follows: "Authority is given to mortgage its railroad, its corporate franchises and any of its real and personal property or any part or portion of the same. * * * Said first mortgage bonds and the mortgage securing the same shall be a prior lien only to the extent of twelve thousand five hundred dollars upon each and every mile of the aforesaid main line of railroad within the State of Louisiana, including all the right of way, road bed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars and real and personal estate within the State of Louisiana, appurtenant to or necessary for the operation of said main line of railroad owned by the company at the date of said mortgage or which may be acquired by it thereafter, and on the corporate franchises and privileges of said company granted by the State of Louisiana relative to the construction, operation and use of said main line of said railroad within the State of Louisiana.' By various provisions in the Act, second mortgage bonds are to be guaranteed by the State, and in this view it is obvious why the power to make a first mortgage and the lien thereof was restricted. The second mortgage was to sesure the State; and as a matter of agreement and public policy the first mortgage was not only limited in amount but its lien was restricted to the property above described. It appears that after the granting of the aforesaid mortgage in 1870.the land grant was made in 1871 and that in December, 1872, an Act of the Legislature of Louisiana was passed (Acts of 1872 number 100, bound up in Acts of 1873) referring to the grant, conferring by necessary implication the right to accept and deal with it, providing for the giving up of the scheme of the second

mortgage bonds guaranteed by the State under the Act of 1869, and authorizing first mortgage bonds at the rate of $30,000 per mile; to be a first lien and privilege on the real and personal property of said Company and all lands acquired by Act of Congress or otherwise. It therefore seems clear that there was no specific legislative authority anterior to the mortgage of 1870, nor afterwards, by ratifying legislation, for the New Orleans, Baton Rouge and Vicksburg Railroad Company in 1870 to mortgage after-acquired land not appurtenant to the railroad. The act of mortgage in describing the property to be affected after enumerating the main line and branches of the road continues as follows:

Together with the right of way, roadbed, rails, depots, stations, shops, buildings, machinery, engines, cars, tenders and other rolling stock, also all real and personal estate within the State of Louisiana owned by the said Company at the date of this mortgage, or which may be acquired by it thereafter appurtenant to or necessary for the operation of said main line of said railroad, or any of said branches connected with the said main line or to be connected therewith, also all other property real and personal of every kind and description whatever and wheresoever situated, in the State of Louisiana, which is now owned or which shall hereafter be acquired by the said Company, and which shall be appurtenant to, or necessary or used for, the operation of said main line of railroad or any part of said branches, also the tenements, heriditaments and appurtenances thereunto belonging and all of the estate, right, title and interest, legal and equitable, of the said Company and its successors and assigns therein, together with the corporate franchises and privileges of said Company at any time granted or to be granted by the State of Louisiana, relative to the construction, operation, and use of said railroad within said State.

This description is very full and a cursory examination of it might convey the idea that thereby the railroad company intended to mortgage all the property it had or ever should acquire, but a careful examination will show very plainly that although many words are used, really nothing was intended to be mortgaged but the railroad and its appurtenances then owned or thereafter to be acquired: 'Together with the corporate franchises and privileges of said Company at any time granted or to be granted by the State of Louisiana relative to the construction, operation and use of said railroad within said State.'

I am satisfied that a land grant for the purpose of aiding in the construction of a railroad cannot be considered an appurtenance of said railroad, and that the language of the mortgage in question, carefully considered, was not intended to cover the after-

acquired land grant. As the general law of Louisiana does not authorize a mortgage of an after-acquired land grant, as the special authority to mortgage granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, did not contemplate or authorize the mortgage of such after-acquired grant, and as the language of the mortgage itself does not describe nor include any such after-acquired grant, it is clear to me that the mortgage in question in this case does not and cannot be made to affect, by way of lien or otherwise, the thereafter acquired land grant of 1871. It follows that the complainant should have had a decree granting the relief prayed for in the bill.

It seems hardly necessary to add anything to the cogent argument made by Judge Pardee in the above decision. There are many other considerations that might be urged in support of his conclusion which that learned Judge did not perhaps find it necessary to detail, and there are many authorities which might be added to those which are cited in his opinion.

In Smith vs. McCullough, 104 U. S. 27, where it was held that a railway mortgage even of all property acquired and to be acquired, did not cover certain municipal bonds issued to the mortgagor, although they were in the broad sense property, the Court said that the question must be solved so as to give effect to the intention of the parties, to be collected as well as from the words of the instrument as from the circumstances attending its execution. To this might be added, in the case at bar, a consideration of the statutory authority under which a railway mortgage is made; for, as remarked by Mr. Wood in his work on Railway Law, Vol. 3, p. 1617,: "If the statute specifies what property may be mortgaged, of course the mortgage can embrace no other property." The more we examine the general law of Louisiana on the subject of railway mortgages, the special statute set forth in the bill, the mortgage of 1870 itself, and the circumstances attending its execution, the more plainly will it appear that the claims of the complainants in this case as against the respondents can have no foundation in law or in equity. As noted by Judge Pardee, the

general law and jurisprudence of Louisiana as it existed in 1870, did not authorize the New Orleans, Baton Rouge and Vicksburg Railroad Company to make any other mortgage of after-acquired property except such as should form a part of the railroad and its appurtenances, being added to it as an organism. The special authority given to that railroad company by its charter of 1869, under which this mortgage of 1870 was made, is still more specific. It was quoted by Judge Pardee and it not only does not include a power to mortgage the right to land grant lands to be earned under such a grant as that made during the year 1871, but *ex vi termini* it seems to exclude the power to mortgage such grant or lands. And this for two reasons: Firstly, because the legislature chose to use language which seems necessarily to exclude such an idea, and secondly, because as noted in the opinion above quoted the contemplation at that time was that the State would guarantee second mortgage bonds of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and as a matter of public policy it was desired that the first mortgage should not only be limited in amount, but that its lien should be restricted to the property specially described in the charter. And that property is plainly the railways of that railroad company within the State of Louisiana, right of way, road bed, rails, depots, stations, shops, buildings and machinery, tools, engines, cars and real and personal estate within the State of Louisiana appurtenant to or necessary for the operation of said main line of railroad owned by the company at the date of said mortgage, or which might be acquired by it thereafter, and corporate franchises and privileges granted by the State of Louisiana relative to the construction, operation and use of said lines of railroad within the State of Louisiana. In brief, the authority possessed by the mortgagor of 1870, to make the mortgage sued on, was limited to a mortgage of its railroads and other appurtenant

property, and it seems plain that a land grant made by the Act of Congress of 1871 could not be considered as an appurtenance to a railroad. On this point we here refer to the decision In Humphreys vs. McKissock, 140 U. S. 304, 313, where the subject of appurtenances and things appurtenant is discussed and decided,and rules laid down under which it is impossible to hold that this mortgage of 1870 could cover land grant lands earned by the New Orleans Pacific Railway Company in 1881 and 1882 under the grant of 1871. Taking the general law of Louisiana and and the charter of 1869 together, it seems safe to say that the rules laid down by Mr. Jones on Mortgages, sections 156-156, apply here. These rules are that "a mortgage by a railway company does not by implication cover property not essential to its business, unless it is specifically described by the terms of the mortgage," and "after acquired land not within the terms of the mortgage and the law authorizing it is not covered by it."

Having referred to the special authority under which this mortgage of 1870 purports to have been made, if we now refer back to the description in the mortgage itself, we shall find that it was very carefully drawn in such a way as to conform precisely to the power given in the charter. It does not profess to mortgage any land grant lands. It does not contain a syllable which can be made to intimate the slightest reference to a land grant, and it really excludes such land grant lands. The description undertakes to mortgage about five hundred and one miles of railroad expected to be built and all real and personal estate within the State of Louisiana owned by the said Company at the date of this mortgage or which may be acquired by it thereafter, *appurtenant to or necessary for the operation of* said main line of said railroad, or any of said branches connected with the said main line, or to be connected therewith; also all other propperty real and personal of every kind and description whatsoever

and wheresoever situated in the State of Louisiana which is now owned, or which shall hereafter be acquired by the said Company, AND which shall be appurtenant to or necessary for the operation of said main line of railroad, or any of said branches; also the tenements, hereditaments and appurtenances *thereunto* belonging, and all of the estate, right, title and interest, legal and equitable, of the said Company, and its successors and assigns *therein*, together with the corporate franchises and privileges of said Company at any time granted or to be granted by the State of Louisiana relative to the construction, operation and use of said railroad within said State."

We may eliminate at once from consideration the clause concerning franchises and privileges. The land grant and the lands in question are not a franchise or privilege, nor was the grant made by the State of Louisiana. As already remarked, the bonds made part of the bill refer to franchises and privileges granted by Act of Congress, but this reference is not in the mortgage and it is with the mortgage alone that we, as third persons, have to deal.

The mortgagor in 1870 was not even authorized to accept and deal with the land grant, and the words of description do not indicate even a contemplation of such grant. For these reasons, in what Mr. Woods calls the well-considered case of Meyer vs. Johnson, 53 Alabama, 237, it was held that a mortgage made in 1852, even of all the property, present and future, of the Alabama and T. Railroad Co., did not cover lands granted to the Company by the State in 1858, the State having derived them from the United States in 1854. Our case is much stronger than that, for the mortgage of 1870 does not profess to mortgage all property present and future, but, as to after-acquired property, only such as should be appurtenant to and necessary for the operation of the railroad. The Alabama Court refers with approval to Sey-

mour vs. Canandaigua and Niagara Falls Railway Co., 25 Barbour, 284, which is also in point, where it was held that a mortgage of a road constructed and to be constructed, and of real estate then owned or thereafter to be occupied for the railway, must be deemed to refer to the property of the road; and certain lands afterwards acquired by the Company, but not used for railroad purposes, would not come within the description of the charter. The decision above refered to from 53d Alabama was reaffirmed by the Supreme Court of that State in Meyer vs. Johnson and Stewart, 64 Alabama, 603. See also Morgan vs. Donovan, 58th Ala. 241.

The description in this mortgage of 1870, so far from including a land grant, and its lands, operates to exclude them; and to adopt the language and reasoning of this Court in Smith vs. McCullough, 104 U. S. 28, if the draughtsman had written "all real and personal property of the company owned at the date of this mortgage, or which may be acquired by it thereafter," and then stopped, there would have been somewhat more force in the complainant's contention. But he did not stop, nor did he mean to stop. He went on and limited the lien as it was limited in the charter, to after-acquired property which should be appurtenant to or necessary for the operation of the road. The case of Smith vs. McCullough is distinctly in our favor. The enumeration of what was mortgaged plainly excludes what was not recited.

That the phrase "appurtenant to and necessary for the operation of the railroad" in a mortgage of 1870, cannot be held to include lands granted by Congress in 1871, appears from many decisions. Most of the cases on this point are summed up by Jones on railroad securities, sections 104-120. The author states that under a mortgage of a road with its corporate privileges and appurtenances only such property passes as is directly appurtenant to the road and indispensably necessary for the enjoyment of its

franchises. And the same rule was laid down by this Court in the case of Humphreys vs. McKissock, above cited.

It was held therefore in Shamokin Valley Railroad Co. vs. Livermore, 47 Penn., State, 435, that such a mortgage does not cover town lots adjoining the road-bed, without specific mention of the lots. Nor would a mortgage of a railroad and appurtenances cover wood-land not connected with the road, though acquired for the purpose of supplying it with timber and fuel. Dinsmore vs. Racine & Railway Co., 12th Wisconsin, 649. See also Farmer's Loan, etc., Co. vs. Carey, 13 Wis. 119

Nor would a mortgage of property belonging to or appurtenant to a railroad cover canal boats owned and used by the railroad company, but beyond the terminus of its road. Parrish vs. Wheeler, 22 New York, 494.

Nor steamboats purchased to withdraw them from opposition business. Morgan vs. Donovan, 58 Ala. 241.

Nor would a mortgage of a main line of railroad and its appurtenances cover lands lying across the Mississippi beyond the terminus of the main line. Buck vs. Memphis, etc., 4 Cent. Law Jour. 430.

So, where a railway mortgage covered materials and every other kind of property "which shall be used for operating said railroad," it was held that it did not cover after-acquired property except so far as it should become appurtenant to, or be used for operating the road, and that certain railroad chairs, afterwards acquired by the company, but never used in the construction of the road, were not appurtenant to it nor used in operating it, and were therefore not covered, even though surrendered under the belief that they were. Farmer's Loan etc., Co. vs. Commercial Bank, 11 Wis. 207; 15 Wis. 424.

So in Welsh vs. Barton, 24 Ohio State, 28, a mortgage of a railroad and all property "hereafter to be acquired, used or ap-

propriated for the operation of the road," was held not to be a lien upon real estate of the company then owned or afterwards acquired, which had been used or appropriated for operating or maintaining the road.

In Calhoun vs. Memphis etc., R. R., 2d Flippen, 442, it was held that lands, even adjacent to the road-bed, not used in its actual operation, and not specifically described in the mortgage, were not covered by a mortgage of the railroad then constructed and to be constructed, etc., and all other property, real and personal, belonging or appurtenant to the said railroad, whether then owned or thereafter to be acquired. This decision has been approved by the Supreme Court of Mississippi in the case next cited, as one of learning and ability, and it refers *arguendo* to a land grant as something which might be covered if existing and specified, but would not be unless described.

In Mississippi Valley Company vs. Chicago, etc. Co. 2 Am. and Eng. R. R. cases, 414, lastly referred to, it was held that a railroad mortgage which in general terms includes future acquisitions, will not affect any property subsequently acquired except what is appurtenant to and necessary for building or operating the road and carrying out its purposes as a carrier, and therefore did not cover a hotel acquired, owned and let by the mortgagor. This decision is much in point on the question of appurtenances and operation.

In the recent case of Boston, etc. R. R. Co. vs. Coffin, 12 Am. and Eng. R. R. cases, 375, the highest Court of Connecticut has held under a description identical in import with the one at bar, that lands purchased by the mortgagor, "outside of the layout of the road," and not needed for construction or operation, were not covered. This case is directly in point in our favor upon the meaning of the words "appurtenant to and necessary for the operation of a railroad," and is conclusive.

We refer also to Wilson vs. Boyce, 92 U. S. 320, as inferentially in our favor. The lien there was statutory and at first extended only to the railroad and appurtenant property. By a subsequent statute it was extended to *all* the property of the railroad company. It was evident, we think, that under the former statute it would not have covered the lands in controversy. The lands had already been granted to the Company. The Court said:

"In the first mortgage the State took its security upon *the road and its appurtenances.* In its second mortgage it *authorized* and obtained security not only upon the road of the company and every part thereof; but also upon its property, meaning its other property, and all of its other property. It is difficult to conceive any reason for this extension of the language in the statute excepted as an intended of extension security. Time had passed without the completion of the road. A large additional loan was now made and a desire to receive additional security gives a natural and logical explanation of the additional words inserted in the mortgage."

This opinion is replete with inferences in our favor. If the Cairo and Fulton Railroad before obtaining a land grant had consented to a lien on its road, and upon present and future property appurtenant to or necessary for the operation of the road, and afterwards had obtained a land grant, it is impossible to imagine that such a lien would have covered the lands. And we are confirmed in this view by a reference to the case of Alabama vs. Montegue, 117 U. S. 602-610. The rules there laid down by this Court are distinctly in our favor in this controversy. If the town lots in Tennessee there drawn in question were not included in the mortgage there involved, it is reasonably certain that the land grant lands of the New Orleans Pacific Railway Company are not covered or affected by this mortgage of 1870.

The decision in Tucker vs. Wilkinson, 22 Wallace, 527, is in point in our favor. The Flint and Pere Marquette Railroad Co. claimed that its granted lands were exempt from taxation, under a statute which imposed on the Company a specific tax with reference to the road and its equipments and appurtenances of whatever kind, with a right to impose a further tax on gross earnings and enacted that the above several taxes should be in lieu of all other taxes to be imposed within the State. The Court said of the claim: "This proposition is unsound. There are several answers. We will state but one of them. That section imposes a tax with reference to the railroad itself. It has no relation to the lands owned by the Company not used nor necessary for operating the road. The lands of the class here in question were not present to the mind of the Legislature when that section was passed. The language employed cannot receive the comprehensive construction contended for (p. 574.) * * * * The taxes involved in this controversy (that is, on the granted lands) were not to be upon the corporation, nor upon the property used in the exercise of its franchises, but upon lands which it had mortgaged and was holding for sale."

In other words, we have it decided by the Supreme Court of the United States that the phrase "railroad and its equipment and appurtenances of whatever kind," does not include, but excludes, lands granted to the railway company and held for sale. Such lands are not appurtenant to the railroad, or used for the exercise of its franchises.

So in Mobile Railroad vs. Mosely, 52 Miss. 127, citing the above case, it was held that, although under the charter of the Mobile and Ohio Railroad, all the real and personal property of every sort necessary to and used in the business of the Company was exempted from taxation, this did not include and exempt the lands granted by Congress to the State and by the State to the

Company. We are not left in doubt as to what this means, for in the case above cited of Mississippi Valley Co. against Chicago Railroad, 2 Am. and Eng. R. R. cases, 416, the Mississippi Court cited this decision as showing what property may be considered as appurtenant to a railroad.

In Tennessee vs. Whitworth, 117 U. S. p. 188, the Court said of a railway company: "The capital * * * * * has been converted into the railroad and its appurtenances, and it had no separate existence as a taxable thing after the railroad was built and equipped." Thus likening the appurtenances of a railroad to the equipment essential to its use.

In construing the mortgage of 1870, we might further refer to the power of entry by the trustee (Trans. p. 13). The trustee is to enter in a case of default and is to operate the road, but it is nowhere intimated that it will have a land grant to manage and there is no provision looking to any plan of management of such peculiar property. What could the trustee do with granted lands if they were subject to the mortgage? It could not use them as appurtenant to the railroad, nor would they afford any assistance in its operation. It could not sell then to settlers, for every forty acre lot would be bouud for the whole sum secured by the mortgage without any provision for a release.

And this brings us further to consider upon the face of the bill of complaint and the mortgage thereto annexed, the system of mortgages and of recordation which prevails in Louisiana. In no other State are the rights of third persons more strictly guarded. See Bondurant vs. Watson, 103 U. S. 281. Vance vs. Vance, 108 U. S., 514.

To this end, a conventioned mortgage, that is to say a mortgage like the one in the case at bar, must contain some description of the immovables upon which it bears in such way as to at least indicate their *nature and situation.* R. C. C. 3306 (3273),

and where there is a total want of description of situation of the thing mortgaged the mortgage is null and void. Keiffer Bros., vs. Stern, 27 An. 282.

By the Louisiana Constitution of 1868, Art. 123, in force in 1870, it was provided that no mortgage or privilege should thereafter affect third persons unless recorded in the parish where property to be affected is situated. By the Constitution of 1879, Art. 176, this provision is still continued as to all real estate, so that in October, 1870, and thereafter, the result of these provisions as to description and recordation was, we submit, to make it legally impossible that the land grant lands in controversy in this case could have been covered or affected by the mortgage sued upon in this case. The right under the land grant, as we have seen, was acquired by the New Orleans Pacific Railway Company in January, 1881. It constructed its railway, earned the lands, expended great sums of money, made its mortgages of 1883-1884 to the respondents Dillon and Alexander, and this without the slightest notice by the mortgage of 1870 or its registry in any parish that there was any pretense that the mortgage of 1870 could possibly affect the lands in question.

Again, looking at the face of the bill of complaint and its exhibits and considering the circumstances there revealed, which attended the execution of the mortgage of 1870, it appears that the mortgagor had not built any road; that the road projected to Shreveport was a mere branch; that no land grant is alleged to have been in contemplation; that the charter of 1869 made no reference to any land grant; that the charter contained no power to mortgage any land grant and that the attention of the Legislature dwelt entirely on the railroad and its appurtenances real and personal. The only future property which was to be mortgaged was what should be appurtenant to the organism as it grew into a structure called a railroad, and if the mortgagor

had expected a land grant to be made in 1871, is it possible that it could have been meant to be included in this mortgage of 1870? Plainly not. Such a mortgage would have tied up the land grant and embarrassed its administration beyond all possibility of disentanglement. If the mortgage of 1870 had been intended to cover granted lands, provisions would have been made such as are found in land grant mortgages for administering the lands, for selling them out in small parcels to invited emigrants and for releasing such parcels from the lien of the mortgage. More than this: would Congress have made the grant at all if it had been expected that it would fall under the dominion of a mortgage already made for over six millions of dollars on a road which existed only on paper? Plainly not. Such a grant would have been improvident and would have defeated its own purpose. And finally, it appears on the face of the bill that no one ever intended to mortgage a land grant in 1870, because in 1872 the Act No. 100 of that year, included however in the session laws of 1873, for the first time mentioned a land grant, and provided for its mortgage with the road to secure an issue of bonds at the rate of thirty thousand dollars per mile.

It further appears on the face of the bill and the legislation therein cited, that by the 22d Section of the Act of Congress of 1871, the grant was made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns. As appears by the bill, that company transferred its right, title and interest in the grant to the New Orleans Pacific Railway Company, and this transfer had been of course recognized as valid and operative by the issue of patents as stated in the bill, in March, 1885, to the New Orleans, Pacific Railway Company. It is difficult to suppose that Congress would have made this grant in favor of assigns with any idea that it would fall under the cloud of the mortgage of 1870.

Nor does the bill, admitting for the purpose of argument all the facts well pleaded therein to be true, show any equity of any sort in favor of the complainants. Considering what the bill alleges and what it fails to allege, it appears that not only was the land grant never contemplated by the charter of 1869 or the mortgage of 1870, but the New Orleans, Baton Rouge and Vicksburg Railroad Company never built a foot of road or earned an acre of land. Whatsoever road was built was built by the New Orleans Pacific Railway Company and the lands patented to that Company. As the New Orleans, Baton Rouge and Vicksburg Railroad Company never filed anything except a map of general route, the railroad finally constructed must have been definitely located by the New Orleans Pacific Railway Company, which company must have paid the large expenses, not only of constructing said railroad, but of selecting, surveying and other costs required by the Act of Congress of 1876 above quoted. As matter of law, upon the face of the bill and exhibits, the lands in question in this case remained the property of the United States until these things were done by the New Orleans Pacific Railway Company, and when the title passed out of the United States it passed to the New Orleans Pacific Railway Company.

Again, the demurrer should have been sustained under the provisions of the Civil Code of Louisiana, which declare that mortgages are *stricti juris*. Article 3283 (3250) declares that, "the mortgage only takes place in such instances as are authorized by law," and Article 3289 (3256) declares that, "the following objects *alone* are susceptible of mortgage:

"1. Immovables subject to alienation and their accessories considered as immovables.

"2. The usufruct of the same description of property with its accessories, during the time of its duration.

"3. Ships and other vessels."

The right of the New Orleans, Baton Rouge and Vicksburg Railroad Company to earn the granted lands is not in this category, even if it could have been anticipated in 1870. In Voorhees vs. Deblanc, 12 An. 864, the Supreme Court of Louisiana decided that the word "immovables," as employed in the latter Article above cited, which Article specifies the only objects in this State susceptible of mortgage, was intended to embrace only such things as are immovable by their *nature*, as lands, with the buildings thereon, etc., and that it did not embrace an incorporeal immovable, as a right to a succession.

We shall refer to this point again, and we submit the foregoing authorities also on the merits.

II.

The Court erred in dismissing the cross-bill. The statements heretofore made in this brief concerning the averments of the cross-bill and the circumstances under which it was dismissed, show that the action in dismissing it was improvident and erroneous. The demurrer to the cross-bill filed by Parker and adopted by Hamlin, admitted all the facts well pleaded in that cross-bill and showed a case which we submit fully justified the filing of such cross-bill to the end that the whole controversy might be settled, and that the respondents might not merely defend themselves against Parker and Hamlin, but obtain affirmative relief in the premises. It is elementary that where affirmative action is desired by defendants in equity, they have a right, and it is their duty to file a cross-bill. Kernochan vs. Christie, 11 Wheaton, 446. And where a defendant desires relief against a co-defendant as well as against a complainant, such defendant has a right to file a cross-bill. Peay vs. Schenck, Woolworth's Rep. 175. Ayres vs. Carver, 17 Howard, p. 595. In the latter case the Court said: "A cross-bill is brought by the defendant in a suit against the plaintiff in the same suit, or against other de-

fendants in the same suit, or against both touching the matters in question in the original bill. It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill." In other words, it was our right to file the cross-bill and to obtain full and affirmative relief. Before steps could be taken to complete the process, to frame the issues, and to take the evidence, and about a year before the final decision of the cause, on the demurrer of Parker, adopted by Hamlin, the lower Judge dismissed the cross-bill, *in toto*, and as to all parties, and this action was persisted in by the decree found at the foot of page 99 of the transcript, signed *nunc pro tunc* on the 20th February, 1888.

III.

Coming now to the final decrees in favor of Parker and Hamlin, and the evidence which was taken by the parties and which is found in the transcript, we may here properly allude to the opinion of the lower Judge rendered upon the final hearing. It was not annexed to the transcript as contemplated by the rule, because it had not been filed in Court. It was, however, reported in 33d Fed. Reporter, p. 693, and by agreement of parties has since been printed and annexed to the transcript. We submit with due respect that it contains many errors of fact as well as errors of law. The defenses of the respondents are not stated correctly, and there are assumptions of fact which are not sustained by the evidence. It is stated, for example, that the mortgage act sued upon, of 1870, was recorded in New Orleans in 1870. It is stated that certain subscriptions were made and certain amounts paid in to the stock of the New Orleans, Baton Rouge and Vicksburg Railroad Company. Of neither statement is there any proof. It is taken for granted as a part of the circum-

stances of the issue of bonds under the mortgage of 1870, that the bill which afterwards became the Act of Congress of 1871 was pending in Congress and the incorporators of the New Orleans, Baton Rouge and Vicksburg Railroad Company expected a land grant. This, however, the lower Judge does not contend was proved at all, but he seems to take notice of it as a matter of history.

Passing on, however, from these considerations for the moment, we submit, of course, that the cardinal error in the opinion of the lower Judge is the complete misconstruction and misinterpretation of the description in the mortgage of 1870 and its legal effect. The opinion admits in its fifth paragraph our main contention as to the power given to issue these first mortgage bonds and to make a mortgage to secure the same, for it says: "The Company was also authorized to issue First Mortgage Construction Bonds to be secured by a mortgage on the property described in the act (meaning the mortgage act) which is herein quoted," and in the first part of the opinion the description in that mortgage of 1870 is quoted with certain unimportant abbreviations. It is the same that we have already discussed at great length in considering the demurrer, and we can only repeat that, in the light of reason, of logic and of precedent, it is impossible to make anything of that description in connection with the conceded facts on the merits, except a mortgage of certain railroads thereafter to be constructed together with such real and personal estate within the State of Louisiana as was owned by the mortgagor at the date of the mortgage, or which might be acquired by it thereafter, and which should be appurtenant to or necessary for the operation of said main line of railroad, or any of said branches connecting with said main line or to be connected therewith. Also of all other property, real and personal, of every description and kind what-

soever and wheresoever situated in the State of Louisiana, which was then owned or might be thereafter acquired by said Company, *and which should be appurtenant to or nececsary* for the *operation of said railroads.* The final clause of description which is as follows: "Also all the tenements, hereditaments and appurtenances *thereunto* belonging, and all of the estate, right, title and interest, legal and equitable, of the said Company and its successors and assigns *therein*, together with the corporate franchises and privileges of said Company at any time granted or to be granted by the State of Louisiana relative to the construction, operation or use of said railroad within said State" adds nothing to the property mortgaged. It is merely a further attempt to specify things or rights *thereunto* belonging or *therein* existing. In other words, belonging to or existing in what had previously been described as "railroads and property appurtenant to or necessary for" their operation.

It may be noted here that the mortgage sued upon is signed by "Thos. C. Bates, president" (Trans. p. 14), and its exordium, p. 11, declares that he appeared before the notary, averred that he was authorized (pp. 11 and 12) by certain resolutions to make the mortgage sued upon, and therefore proceeds to sign it as above indicated.

The answer of the respondents (p. 32) expressly put at issue the authority of Bates to make this mortgage, as a matter of fact as well as a matter of law. The mortgage does not contain any copy of any resolution authorizing Bates to make the mortgage; it does not refer to any such documents as annexed. The complainants made no attempt to prove that Bates had any authority, and the attention of the lower Judge was expressly called to this want of proof. The opinion, however, assumed that Bates' authority was proved. The decrees might well be reversed upon this point alone, that the so-called mortgage of 1870 was not the

legal act or deed of the New Orleans, Baton Rouge and Vicksburg Railroad Company. It may be observed also that the lower Judge was inaccurate in characterizing what was done by the New Orleans, Baton Rouge and Vicksburg Railroad Company in the locating of a railroad. If we understand what the opinion means in citing such cases as Schulenberg vs. Harriman, 21 Wallace, 60; Railroad Co. vs. U. S., 97 U. S. 738, and Railway Company vs. Railway Company, 97 U. S. 497, it must intend to convey the idea that the New Orleans, Baton Rouge and Vicksburg Railroad Company made some *definite* location of a railroad. The bill of complaint, however, does not claim and could not claim that the mortgagor of 1870 ever made any definite location of a road of any kind. What the complainants averred was that a map of general route was filed, which is made one of the exhibits of the bill. It is true that lands might be withdrawn from the market upon the filing of such a map of general route, but this could only be precautionary. It is certain that the mortgagor of 1870 never made any definite location whatever. The proof shows that its so-called general route was simply a project. It is certain that it never built any road. It is certain that in the language of Schulenberg vs. Harriman, no title could attach to any specific tracts of land by the filing simply of a map of general route. In other words, the opinion seems to assume a definite location by the New Orleans, Baton Rouge and Vicksburg Railroad Company, and an acquisition by that Company of title of some kind to the specific tracts afterwards patented to the New Orleans Pacific Railway Company, when the fact is that there never was any such definite location, and the complainants have never claimed that there was.

The opinion further ignores the fact that it was not legally possible under the law of Louisiana in October, 1870, to mortgage the *right* conferred by the Act of Congress of 1871 on the

New Orleans, Baton Rouge and Vicksburg Railroad Company; not merely because the right did not then exist, but because it was, down at least to 1881-2, when a railroad was definitely located, merely a *right* and not one of those immovables *by nature* which by the law of Louisiana are susceptible of mortgage.

In Voorhees vs. DeBlanc, 12 La. An. 864, 865, already cited in this brief, it was held that the *right of an heir to* immovables of an estate was not susceptible of mortgage at all.

In the opinion and decree of the Court, rendered by Judge Spofford and concurred in by Judge Lea, two of the most learned Judges who ever sat on the Louisiana Bench, it was said:

"Our law-givers have thought it wise to restrain the power of hypothecating property, which is one of the rights of dominion, by the following general and sweeping rule:

"The mortgage *only* takes place in such instances as are authorized by law." C. C. 3250.

"The mortgage right then is to be measured, in every case, by the express grant of power in our Codes and other statute books.

"The following objects *alone* are susceptible of mortgage:

"1. Immovables subject to alienation, *and their accessories*, considered likewise as immovables.

"2. The *usufruct* of the same description of property with its accessories during the time of its duration.

"3. Slaves.

"4. Ships and other vessels." C. C. 3256.

Now it is contended that, because in Article 463, it is declared that 'an *action* for the recovery of an immovable estate or an entire succession,' is 'considered as immovable from the object to which it applies,' such an 'action' is embraced under the designation of "immovables subject to alienation" in the first class of the objects which, according to Article 3256, are *alone* susceptible of mortgage.

"Closer investigation will, we think, show this interpretation to be inadmissible.

"The word 'immovables' is used in various senses in the Code

"There are things immovable by their *nature*, others by their *destination;* and others by the *object to which they are applied.* C. C. 454.

"Slaves are considered as immovables, '*by the operation of law.*' C. C. 461.

"It appears to us that the word 'immovables,' as employed in Article 3256, was intended by the lawgiver to be limited to its first and literal sense, embracing only such things as are immovable by their *nature*, as lands, buildings, etc. We are led to this conclusion, first, because to the expression 'immovables subject to alienation,' is added the phrase 'and their *accessories considered* likewise as immovables,' an addition quite unnecessary if the word 'immovables' had been used in its broadest signification, and as embracing things immovable by their destination as well as by the object to which they are applied; secondly, because the lawgiver has added, as another and distinct class of things susceptible of mortgage, 'the usufruct of the *same description of property* with its accessories during the time of its duration,' there can be no usufruct of an 'immovable action,' or of 'an action for the recovery of an entire succession,' so these *rights* do not fall within the 'same description of property' intended to be specified in the first-class of things susceptible of mortgage; thirdly, because, 'the usufruct of immovable things" is declared, by Article 463, to be considered as immovable from the object to which it applies, and, therefore, it was idle to specify such usufruct as a distinct thing susceptible of mortgage, if the words 'immovables subject to alienation and their accessories' were intended to include all sorts of immovables, whether by nature, destination, or from the

object to which they apply; fourthly, because "slaves," are enumerated as the third-class of things susceptible of mortgage, another superfluous specification, if the word 'immovables' was used in its widest sense, in the first-class, for Article 461 had already declared that 'slaves, though movables by their nature, are considered as immovables, by the operation of law,' and finally, because the enumeration of the 'usufruct' of immovables as subject to mortgage, in Article 3256, and the omission to enumerate the 'action for the recovery of an immovable estate or an entire succession' demonstrate the intention of the Legislature to exclude the latter from the power of hypothecation granted as to certain specified objects alone; *expressio unius est exclusio alterius;* and the argument acquires additional force when we observe that, in Article 463, 'the usufruct and use of immovable things,' 'a servitude established on real estate,' and 'an action for the recovery of an immovable estate or an entire succession,' had been specified as three distinct things *considered* as immovables, from the object to which they apply.' For we cannot suppose that the law-giver enumerated one of these things, in Article 3256, as being liable to mortgage and omitted the other two without a design.

"Article 3296, which declares that: 'The judicial mortgage may be enforced against all the immovables (*biens immeubles*) *and slaves* which the debtor owns or may subsequently acquire' does not, in our opinion, enlarge the catalogue of things susceptible of mortgage, enumerated in Article 3256, if, indeed, it can be considered as embracing all of that catalogue, except ships and other vessels, upon which it is necessary now to express an opinion.

"We therefore conclude that 'an action for the recovery of an immovable estate or an entire succession,' although by legal in-

tendment considered an in *incorporeal immovable*, is not susceptible of mortgage."

In other words, a mere right to certain property, and, *a fortiori*, an inchoate right, is not susceptible of mortgage in Louisiana. It is incorporeal, and not "immovable by nature."

The opinion further ignores the fact that the general route projected by the mortgagor of 1870 did not coincide with the definite location and road of the New Orleans Pacific Railway Company. See maps offered at p. 43 and interleaved between p. 96 and p. 97. When the latter Company definitely located and built the road in 1881 and 1882, the grant attached, not to the sections related to the general, or projected, route of 1871, but to another set. Some of these sections may have been the same. Some, surely, were not. The opinion and decrees which ignore such patent facts cannot be correct.

IV.

It is submitted that the court below erred in paying no attention to the defense of *laches* set up in the answer. It appears by the bill of complaint that at the time it was filed, thirty semi-annual coupons were due on the bonds sued upon. In other words, the bonds were issued in 1870, and for fifteen years not a single coupon had been paid. The suit was filed in 1886. In In the meantime the New Orleans Pacific Railway Company, in 1881, had acquired the right, title and interest of the New Orleans, Baton Rouge and Vicksburg Railroad Company in and to the land grant of 1871; had built a railroad from New Orleans to Shreveport by the way of West Baton Rouge and Alexandria, had expended the great sums of money necessary for that purpose, had made and recorded its mortgages of 1883-4 on the granted lands; had issued its bonds under said mortgages and paid them over to the contractor, had received its patents for lands in 1885; and during all this period of over fifteen years neither

the complainant nor co-complainant nor anybody else had ever pretended that the alleged mortgage of 1870 could in anywise cover or affect these granted lands. If ever there was a case in which the defense of laches should prevail in a court of equity, it seems to us that this is the case.

On this doctrine of laches we refer to the luminous exposition found in Hayward vs. National Bank, 96 U. S. at p. 617. And we submit that the views there expressed, and the authorities there cited, support our contention. For fifteen years the holders of bonds under this alleged mortgage of 1870 were silent. Every six months, or thirty times during that period, they were warned by a defaulted coupon that whatever rights they had were not being realized or enforced. If they really believed that they had any claim on the land grant, why did they not say so? And, as stated in the quotation, at p. 618 of the 96th U. S., "*the rights and liabilities of others have been in the meantime varied*," and these holders, having been silent when they should have spoken, may properly be told to hold their peace when they desire to speak.

V.

The court below erred in denying to the respondents the equities claimed in the answer as well as in the cross-bill and established by the evidence, arising from a definite location and building of the railroad by the New Orleans Pacific Railway Company, the earning by it of the lands in question, the mortgaging of the lands to pay for the construction of the road and the large expenditures made by the respondents for patents and for taxes. We might well say to the complainants as Virgil said to his enemies: "*Sic vos non vobis.*" Neither the complainants nor the New Orleans, Baton Rouge and Vicksburg Railroad Company, nor any of its creditors, that we ever heard of, ever expended a penny in definitely locating or building a railroad, or in selecting any

lands, or in paying any of the large fees required for obtaining patents to lands, nor have any of them ever paid any taxes upon the lands which were severed from the public domain in 1885. The testimony of Mr. Wheelock shows that those fees and taxes amounted up to the year 1886 to some thirty thousand dollars, and of course taxes have been paid every year since this suit has been begun, without any contribution from the complainants or the New Orleans, Baton Rouge and Vicksburg Railroad Company. The decrees in the cause utterly ignore all the equities accorded by these facts, and make no provision for any such equities, or indeed for any other.

VI.

We submit that the court below erred in its opinion in taking no proper notice whatever of the Act of Congress of February 8, 1887, which was brought to its attention by the supplemental answer found at p. 92, and which is accompanied with the letter or circular from the Department of the Interior showing that the Act had been accepted by the New Orleans Pacific Railway Company and the agreement contemplated by it made and filed by that Company. The Act of Congress in question is Chapter 120 of the 24th Statutes at Large, p. 391, approved February 8, 1887. It forfeits the portion of the grant of 1871, east of the Mississippi, and its second section provides as follows: "Sec. 2. That the title *of the United States*, and of the original grantee, to the lands granted by said Act of Congress of March third, eighteen hundred and seventy-one, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, *granted, conveyed and confirmed to the New Orleans Pacific Railroad Company* as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by the said New Orleans Pacific Railway Company in the Department of the

Interior, October twenty-seventh, eighteen hundred and eighty-one, and November seventeenth, eighteen hundred and eighty-two, which indicate the *definite location of said road;* provided that all said lands occupied by actual settlers at the date of the *definite location* of said road and still remaining in their possession, or in the possession of their heirs or assigns, shall be held and deemed excepted from said grant, and shall be subject to entry under the public land laws of the United States." And the sixth section provides as follows:

"Sec. 6. That the patents for the lands conveyed herein that have already been issued to said Company (the New Orleans Pacific Railway Company) be and the same are hereby confirmed, but the Secretary of the Interior is hereby fully authorized and instructed to apply the provisions of the second, third, fourth and fifth sections of this Act to any of said lands that have been so patented and to protect any and all settlers on said lands in all their rights under the said sections of this Act."

This Statute was approved by the President of the United States and confirms the action of President Arthur in 1883 and 1885 in recognizing the New Orleans Pacific Railway Company as entitled to the lands and in patenting the lands to that Company. It may be presumed that Congress in passing this Act of 1887, and the President in approving it, were aware that the New Orleans, Baton Rouge and Vicksburg Railroad Company had never built a single foot of railroad, never earned a single acre of land, and that the five years fixed by the original grant for the completion of *its* road had long ago elapsed. The title of the *United States*, as well as that of the original grantee, to the lands is therefore relinquished, granted, conveyed and confirmed to the New Orleans Pacific Railway Company and the patents to the lands in controversy in this case which had been already issued to the New Orleans Pacific Railway Company in 1885, were confirmed.

In his annual report for 1885, the Secretary of the Interior

made the following recommendation respecting the passage of such an act, which may be quoted as matter of public history.

"The residue of the road (of the New Orleans Pacific Railway Company) from White Castle to Shreveport was built by the Company upon the belief of the full validity of their right to the land granted, and without the benefit of the grant the road would not have been built. The government railroad examiner reports the road substantially built and equipped, and it would not appear to comport with good faith to those who have invested their money on the basis of the grant to take advantage of any techical defect, if any such exists, in the transfer to the Company.

"I would therefore respectfully suggest for the consideration of Congress the propriety of passing an act curative of defect, if any exists, in the transfer to the New Orleans Pacific Company; and vesting the title originally granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, from White Castle to Shreveport, in the New Orleans Pacific Road."

This Act of 1887 goes further and contains words of grant as well as of confirmation. When we consider the report of the Hon. the Secretary of the Interior; the decision in Northern Pacific Railroad Company vs. Traill County, 115 U. S. 600, decided in December, 1885, and which we cite; the fact that the original grantee had done absolutely nothing to earn the grant for not only five, but nearly ten years; when it is considered that the New Orleans Pacific Company had, at great expense, built a railroad and earned the lands; it seems clear to us that when Congress said we should have the title both of the *United States* and the former grantee, the effect was to clothe and vest the New Orleans Pacific Railway Company with all the title the United States had in the premises; and this was done, not for the benefit of the complainants in this cause or those whom they cham-

pion, but for the purpose of securing to the New Orleans Pacific Company the benefit of the curtailed grant.

The Act forfeits the grant east of the Mississippi River, and we submit conveys and confirms to us the rest of it clear of any possible equity in the New Orleans, Baton Rouge and Vicksburg Railroad Company or its creditors, and this was its object.

VII.

The lower Judge erred profoundly in his disposition of the question of the recordation or inscription and reinscription of the alleged mortgage of 1870. He even failed to state correctly the issues on this point. He states in one part of the opinion that the mortgage of 1870 was recorded in New Orleans—*i. e.*, in the Parish of Orleans, the domicile of the alleged mortgagor, although of this there is no proof. He quotes in two other portions of the opinion, Sections 726, 727, 2396, 2397 of the Revised Statutes of Louisiana of 1870. Of course, if we are right in our contention that the mortgage of 1870 does not describe, affect or bear on our lands, patented in 1885, it matters not how many errors the lower Judge may have made upon this question of recordation and re-inscription; but if the conclusion should be reached (which we can hardly anticipate) that the alleged mortgage of 1870 does establish a lien upon those lands, then we affirm that under the system of registration or recordation which prevailed in Louisiana in the year 1870, and still prevail, this alleged mortgage of 1870 was never recorded and reinscribed in such a way as to notify the respondents or any other third persons. The provisions of the Revised Statutes of 1870, above referred to and quoted by the lower Judge, are as follows:

"Section 726. Any railroad company established under the laws of this State may, to secure the payment of any obligation contracted by said Company for the construction of the road, mortgage their *road*, in whole or in part; and such mortgage, if made of the *entire road*, shall bear upon the *entire road*, though

the same be not completed at the time the mortgage was made; and such mortgage may also be made to bind the *appurtenances* of said road, its warehouses, depots, water stations, locomotives, etc."

"Sec. 727. A mortgage made by any of the companies shall bind the *road, its warehouses, depots, water stations, locomotives and other appurtenances*, that may be mortgaged in the several parishes where the same may be, by the record of the mortgage in the parish where the principal office or domicile of the road may be; and *such* mortgage need not be reinscribed to continue it in force."

"Sec. 2396. In addition to the powers conferred by law upon railroad companies, any railroad company established under the laws of this State may borrow from time to time such sum of money as may be required for the construction or repairs of any railroad, and for this purpose may issue bonds or their obligations secured by mortgage upon the franchises and *all the property* of said companies, and payable at such times and places as the president and directors may designate, with power to sell, pledge or otherwise dispose of said bonds on such terms as the said president and directors may deem expedient."

"Sec. 2397. A mortgage by any company, as *aforesaid*, shall be binding in the several parishes through which a *railroad may pass* by the record of the mortgage in such parishes, and such mortgage need not be reinscribed to continue it in force. The president and directors of any company may confer on the holder of any bond or bonds issued for money for the use of said Company the right to convert the principal due thereon into the stock of said Company at any time, not exceeding ten years from the date of said bond or bonds, under such regulations as the President and Directors may adopt; *Provided*, That nothing in this Act shall be so construed as to authorize an increase in the capital stock of any railroad company."

As shown by the margin of the Revised Statutes, Sections 726 and 727 were taken from an Act of 1855, while 2396 and 2397 were taken from an Act of 1856. A careful examination of these

Sections in connection with the Constitutions of 1868 and 1879 will show that they afford no support to the findings of the lower court. Sections 726 and 727 contemplate a mortgage of a *railroad*, completed or not completed, and Section 727 provides that such mortgage shall bind the *road*, its warehouses, depots, water stations, locomotives and other appurtenances that may be mortgaged in the several parishes where the same may be, by the record of the mortgage in the parish where the principal office or domicile of the road may be, and *such* mortgage need not be reinscribed to continue it in force. Three reasons may be given at once why these provisions of Sections 726 and 727 do not support the action of the lower Judge.

(1) The lands in question are not included in the catalogue of objects in Section 727, and the mortgage in suit here as to those lands is not "such" a mortgage as the section refers to.

(2) The mortgage in suit does not appear to have been recorded in the parish where the principal office or domicile of the road was, viz: the Parish of Orleans, and the provisions of Section 727, whether as to record or reinscription, cannot apply.

(3) The provisions of these two Sections, 726 and 727, taken as they are from an Act of 1855, have been plainly superseded by the Constitutions of 1868 and 1879, by both of which instruments, as we have seen, the people of Louisiana by their organic law have provided in the most positive terms that no mortgage of immovable property shall affect third persons unless it be recorded *in the parish where the property is situated.* We print the provisions of these sections in the appendix.

Passing on now to Sections 2396 and 2397 of the Revised Statutes, we see from the margin of the book that they are a reproduction of an Act of 1856. Their language is a little different. Section 2396 does not contain any reference to *future* property. When, therefore, Section 2397 provides that a mortgage made by

any company as aforesaid shall be binding in the several parishes through which the railroad *may pass* by the record of the mortgage in such parishes, and *such* mortgage need not be reinscribed to continue it in force, it may be justly said:

(1) Such a mortgage can only be of the property of the company existing and owned at the time it is made.

(2) It will be binding in the several parishes through which the railroad *may pass* by the record of such mortgage in such parishes, and *such* mortgage need not be reinscribed to continue it in force. But, binding on what? Binding on the property owned by the mortgagor at the time the mortgage is made. Binding where? Where the railroad may *pass*. But the railroad never "passed." It was never built nor was the mortgage here in suit "such" a mortgage as that referred to in the Sec. 2397.

(3) If Sections 2396 and 2397 are capable of the construction placed upon them by the lower Judge, then they fly in the face of the constitutional provisions of 1868 and 1879. They defy the organic law. They were included in the revision of 1870 by mistake, and it is legally impossible that under any of their provisions the alleged mortgage of 1870, which is considered in this case, can have been so recorded and reinscribed as to affect third persons with reference to the lands in dispute.

The complainants in their evidence showed that the act of mortgage sued upon was recorded in the parishes only of Calcasieu, St. Landry, Natchitoches, DeSoto, Rapides, Grant and Sabine. The attention of the Court is called to some dates. It was recorded in De Soto in October, 1870, in Rapides in October, 1870, in St. Landry in 1870, in Natchitoches in 1870, and was never reinscribed at all. The recordations in Sabine, Calcasieu and Grant were not made until the latter part of the year 1885. The bill avers that all the land grant lands in question are situated in the parishes of De Soto, Sabine, Natchitoches, Vernon, Rap-

ides, Avoyelles, St. Landry, Calcasieu, Catahoula, Winn, Red River, Bienville and Bossier, in the State of Louisiana. It results therefore that the alleged mortgage of 1870, under which complainants claim, has never been recorded at all in the parishes of Vernon, Avoyelles, Catahoula, Winn, Red River Bienville and Bossier. It appears, at p. 26, that the land grant mortgages made by the New Orleans Pacific Railway Company to Messrs. Dillon and Alexander were recorded in all of the parishes, respectively, in April and May, 1883, and February, 1884. Restating the list of parishes (or counties) of Louisiana, we find that the mortgages made by the New Orleans Pacific Railway Company to Messrs. Dillon and Alexander prime the mortgage sued upon, by *priority of recordation*, in the parishes of Winn, Grant, Bienville, Bossier, Webster, Catahoula, Caddo, Avoyelles, Red River, Sabine, Vernon and Calcasieu, while as to De Soto, Natchitoches, Rapides and St. Landry, the mortgage of 1870, though recorded in 1870, has never been reinscribed at all. It is only necessary to refer to the cases of Bondurant vs. Watson, 103 U. S. 281, and Vance vs. Vance, 108 U. S. 514, both from Louisiana, to see how grave are the errors of the lower Judge on this subject.

We ask that the decrees appealed from be reversed and that the proper orders be made as to further proceedings in the cause.

Respectfully submitted,

WILLIAM WIRT HOWE,
JOHN F. DILLON,
WAGER SWAYNE,
For Appellants.

DECEMBER, 1891.

APPENDIX.

Extracts From Act No. 143 of 1869.

No. 143.] AN ACT

To incorporate the New Orleans, Baton Rouge and Vicksburg Railroad Company, and to expedite the construction of their road.

Section 1. *Be enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That George W. Cochran, Thomas C. Bates, J. P. Sullivan, Michael Hahn, J. H. Oglesby, J. S. Scott, George W. Comstock, their associates and successors, are hereby created a body corporate, in deed and in law, to be known by the name, style and title of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and by that name shall be able to sue and be sued, plead and be impleaded, and shall have perpetual succession, and make and have a common seal, and the said corporation is hereby authorized and empowered to lay out, locate, construct, equip and thereafter to own, maintain, operate and enjoy a continuous single or double track railway from any point on the line of the New Orleans, Jackson and Great Northern Railroad within the Parish of Livingston, running from thence to any point on the boundary line dividing the States of Louisiana and Mississippi by such route as the Company may deem most direct and practicable, with a view of continuing and completing the said railroad to the City of Vicksburg, in the State of Mississippi.

Sec. 2. *Be it further enacted, etc.*, That the said Company is hereby further authorized and empowered to lay out, construct, and equip, and thereafter to own, maintain, operate, and enjoy a single or double track branch railway from such points on its main line as the Company shall determine, to the City of Baton Rouge, and such other branches as the Company may deem

proper, from their main line to other points on the Mississippi River within the State of Louisiana, and all the provisions of this Act applying to the main line of said New Orleans, Baton Rouge and Vicksburg Railway, are extended and made to apply to such branches by this section authorized to be constructed; and should the said Company acquire by grant or purchase, other railroads or parts of railroads, rights of way or franchise appertaining thereto, the same shall be merged into and become part of the said New Orleans, Baton Rouge and Vicksburg Railroad.

SEC. 13. *Be it further enacted, etc.*, That the said Company is hereby authorized to obtain, by grant or otherwise, from any parish, incorporated city or village within the State of Louisiana that may be situated upon its railroad, any rights, privileges or franchises that any parishes or said incorporated cities or villages may choose to grant in reference to the construction, maintenance and management of the railroad of said company, its depots, cars, locomotives, and its business within the limits of such parish, or any of said incorporated cities and villages, and any such incorporated city or village, as hereinbefore named, is hereby authorized and empowered to grant to said Company any such rights, privileges and franchises as it may deem proper and advisable, and such rights, privileges and franchises, when granted to and accepted by said Company from any such incorporated city or village, shall be deemed and taken as rights, privileges and franchises vested and confirmed in said Company, and not liable to be hereafter revoked, changed, altered or impaired, except with the consent of said Company.

SEC. 14. *Be it further enacted, etc.*, That said Company is authorized and empowered, from time to time, to borrow money or to purchase property upon its own credit for the purpose of constructing and maintaining said railroad, or establishing continuous and connecting lines of railroad, and, as evidence of the

indebtedness of said Company for such loans or the purchases of such property, may issue its corporate bonds or promissory notes, bearing interest at a rate not to exceed eight per centum per annum, and, to secure the payment of said bonds and notes, may mortgage its railroads, its capital stock, its corporate franchises, and any of its real or personal property, or any part or portion of the same, and it may, by its president, or other officers or agents, duly authorized by its directors, sell, dispose of, negotiate such bonds and notes, or may sell, dispose of, or negotiate its capital stock or any of its personal property at such times and places, and at such rates and for such prices, either within or without this State, as, in the judgment of said Company or its directors, will best advance its interests, and if such bonds, notes or stocks are thus sold at a discount, such sale shall be, in all respects, valid and binding upon this company, and such stocks, bonds or notes shall be as valid for the par value thereof as if the same had been sold at par value; *provided, however,* that said Company shall not secure the payment of its corporate bonds or promissory notes, so authorized to be issued and disposed of by a first mortgage upon its property, franchises and effects, to an amount exceeding the sum of twelve thousand five hundred dollars for each linear mile of railroad which said Company is authorized to construct under this act.

SEC. 15. *Be it further enacted, etc.,* That the New Orleans, Baton Rouge and Vicksburg Railroad Company be and it is hereby further authorized to make and issue, from time to time, as hereinafter provided, its bonds to be known as "second mortgage bonds of the New Orleans, Baton Rouge and Vicksburg Railroad Company, guaranteed by the State of Louisiana," and of such denominations as the Company may elect, but to an amount not exceeding in the aggregate twelve thousand five hundred dollars for each and every mile in length of the main line

of its railroad and branches within the State of Louisiana, which said Company shall construct. Such bonds shall be numbered consecutively, and shall be made payable to the State of Louisiana, or bearer, at such time as the Company may designate therein, not more than fifty nor less than forty years from their date, and shall bear interest at such rate as the Company may designate therein, not exceeding eight per cent. per annum, payable semi-annually, and coupons for such interest shall be annexed thereto. The principal or interest, or both, of said bonds may, at the option of the Company, be made payable in lawful currency of the United States, or in gold coin or in English sterling, and if payable in sterling, two thousand five hundred pounds sterling per mile, shall, for the purpose of this act, be deemed within the limitation of twelve thousand five hundred dollars per mile in this section contained, and the place of payment of the principal and interest of said bonds, or any of them, may be either at the City of London, in England, or the City of New York, as the Company may elect and designate in such bonds.

SEC. 16. *Be it further enacted, etc.*, That the payment of the principal and interest of such bonds shall be secured by mortgage, to be executed by said Company, to the Governor of the State of Louisiana, as trustee, for whomsoever shall from time to time be holders of said bonds, and also for the State of Louisiana and for the said Company, and whosoever shall from time to time be Governor of said State shall be the trustee under said mortgage, and be vested with the rights and powers conferred upon such trustee, and charged with the duties hereinafter imposed upon him. The said mortgage shall be a lien upon the whole of the said main line of railroad of said Company within the State of Louisiana, and upon all the right of way, roadbed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars and real and personal estate within the State of Louisiana

appurtenant or to or necessary for the operation of said main line of railroad owned by the Company at the date of said mortgage, or which may be acquired by it thereafter, and also upon the corporate franchises and privileges of said Company granted by the State of Louisiana relative to the construction, operation and use of said main line of railroad within the State of Louisiana; but the lien of such mortgage shall be subject and subordinate to a prior lien, to the extent next hereinafter specified, in favor of a first mortgage, to be made by said Company to secure bonds to be known as "first mortgage bonds of the New Orleans, Baton Rouge and Vicksburg Railroad Company." Such *first mortgage bonds* and the mortgage securing the same shall be a prior lien only to the extent of twelve thousand five hundred dollars per mile, payable in coin or currency, or two thousand five hundred pounds sterling, of such mortgage bonds and the interest which may accrue thereon, at a rate not exceeding eight per cent. per annum, payable semi-annually, upon each and every mile of the aforesaid main line of railroad within the State of Louisiana, including all the right of way, roadbed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, and real and personal estate within the State of Louisiana, *appurtenant to or necessary for* the operation of said main line of railroad, owned by the Company at the date of said mortgage, or which may be acquired by it thereafter; and of the corporate franchises and privileges of said Company granted by the State of Louisiana, relative to the construction, operation and use of said main line of railroad within the State of Louisiana; the principal of each first mortgage bonds not to be payable in less than forty nor more than fifty years from their date, unless in case of default in payment of interest thereon, and in case of a sale of said railroad or any part thereof for the satisfaction of said first and second mortgage bonds, or either of them, the pro-

ceeds of the rolling stock and personal property which may be sold shall be deemed to appertain to that portion of said main line of railroad within the State of Louisiana which shall have been constructed and operated, and shall be apportioned equally upon each mile thereof, and shall be deemed proceeds of the completed portion of said railroad, and the lien of said first mortgage shall be governed by the further provisions hereinafter contained.

No. 100.] AN ACT

To authorize the New Orleans, Baton Rouge and Vicksburg Railroad Company to select the point or points for the commencement of their road, to reduce the liability of the State of Louisiana by authorizing said Company to issue first mortgage bonds, and to construct and employ, or cause to be constructed and employed, steamboats or other vessels and telegraph lines along the line of railroad of said Company.

WHEREAS, By the act of the Legislature of the State of Louisiana approved December 3d, 1869, entitled an Act to incorporate "The New Orleans, Baton Rouge and Vicksburg Railroad Company, and to expediate the construction of their road," the Governor of the State was authorized to indorse the guarantee of the State upon the second mortgage bonds of said railroad company to the amount of twelve thousand five hundred dollars per mile upon the completion of each twenty miles of road; and,

WHEREAS, Said Company has, by Act of Congress (approved March 3, A. D. 1871), entitled an Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes, become the recognized branch of the Texas Pacific Railroad, from its eastern terminus, through the States of Texas and Louisiana, to the

city of New Orleans, and under such Act of Congress has become the grantee of every alternate section of land in a belt of forty miles each side of said line of railroad from New Orleans to the State line in Louisiana, and said Act of Congress has been executed by the government of the United States by the withdrawal of all the public lands within the aforesaid boundary for sale or entry under any law; and, whereas, the early commencement, construction and completion of the New Orleans, Baton Rouge and Vicksburg Railroad is secured by said grant of land from the United States Government and the legislation herein provided:

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the New Orleans, Baton Rouge and Vicksburg Railroad Company shall have full power and authority to commence the construction of their road in the City of New Orleans or Shreveport, or any intermediate point or points on their line of road, as may best suit the convenience of said Company and facilitate the speedy construction of a continuous line from the City of New Orleans to the City of Shreveport, or perfect railroad communication with the Texas Pacific Railroad, or any other railroad in Northwestern Louisiana, at or near the Louisiana State line; *provided, however*, that the said Company shall construct the line of its road between the City of New Orleans, and the City of Baton Rouge, on the east side of the Mississippi River, to the corporate limits of the said City of Baton Rouge, or adjacent thereto. And the said New Orleans, Baton Rouge and Vicksburg Railroad Company is hereby authorized to issue, from time to time, as it shall deem proper, its first mortgage bonds, to an amount not exceeding thirty thousand dollars per mile upon its line of railroad, or any part thereof, and payable, principal and interest, in gold or cur-

rency, at the option of the said Company, with interest coupons annexed. The maturity of said bonds may be fixed by said Company at any time not exceeding forty years from the date thereof, and bearing interest at a rate not exceeding eight per cent. per annum, and the said coupons payable semi-annually, on the presentation thereof in the City of New York, or at such other place or places as the Company may designate; and the mortgage thus to be given to secure the payment of said bonds and coupons shall carry with it a first lien and privilege upon the real and personal property and effects of said Company, and *all lands* acquired by Act of Congress or otherwise; *provided, however*, that if the said Company shall make and issue first mortgage bonds under this Act, then and in that event the State aid and guarantee in favor of said Company to the amount of twelve thousand five hundred dollars per mile heretofore given by the State under Act of December 30, 1869, shall be considered as relinquished, so far as it appertains to that portion of its road, or branches, on the east side of the Mississippi River, upon which the aforesaid first mortgage shall be made and issued, and upon the entire road, whether main line or branches, on the west side of said Mississippi River; and the State of Louisiana shall thereby be relieved from the liabilities to give the aforesaid aid and guarantee upon all the road covered by the bonds and mortgage herein authorized to be issued.

SEC. 2. *Be it further enacted, etc.*, That the said railroad Company (with a view to facilitate the travel and traffic of the said railroad), is hereby authorized and empowered to build and maintain, use and operate, or cause to be built, maintained and operated, steamboats or other vessels of sufficient capacity and size for the purpose of transporting passengers or freight over or upon the Mississippi River, or any other stream or streams within the State of Louisiana, and shall have the right to con-

struct, maintain and operate, or cause to be constructed, maintained and operated, a line or lines of telegraph along any portion of said railroad within the State of Louisiana.

SEC. 3. *Be it further enacted, etc.*, That all the rights, grants, powers and privileges heretobefore granted to the said Company shall remain intact, except so far as they may be altered, changed or impaired by the passage of this Act.

SEC. 4. *Be it further enacted, etc.*, That this Act shall take effect from and after its passage.

Approved December 11, 1872.

EXTRACTS FROM THE REVISED STATUTES OF LOUISIANA OF 1870, AS TO PREDOMINANCE OF PROVISIONS OF REVISED CIVIL CODE OF 1870:

SEC. 3990. * * * That in so far as there may be any conflict between the provisions of this Act and any provision of the said Revised Civil Code and Code of Practice, that said Code shall be held and taken as the law governing, and that this Act take effect on the first day of April, A. D. one thousand eight hundred and seventy.

EXTRACTS FROM THE REVISED CIVIL CODE OF LOUISIANA OF 1870.

Art. 3278 (3245). Mortgage is a right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment.

Art. 3282 (3249). The mortgage is a real right on the property bound for discharge of the obligation.

It is in its nature *indivisible* and prevails over all the immovables subjected to it, and over each and every portion.

It follows them into whatever hands they pass.

Art. 3283 (3250). The mortgage only takes place in such instances as are authorized by law.

Art. 3286 (3253). Mortgage is conventional, legal or judicial.

Art. 3290 (3257). The conventional mortgage is a contract by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure the execution of some engagement, but without divesting himself of the possession.

Art. 3300 (3267). Conventional mortgages can only be agreed to by those who have the power of alienating the property which they subject to them.

Art. 3305 (3272). A conventional mortgage can only be contracted by an act passed in presence of a notary and two witnesses, or by an Act under private signature. No proof can be admitted of a verbal mortgage.

Hypothecations of ships and other vessels are made according to the laws and usages of commerce.

Art. 3306 (3273). To render a conventional mortgage valid it is necessary that the act establishing it shall state precisely the nature and situation of each of the immovables on which the mortgage is granted.

Art. 3308 (3276). Future property can never be the subject of conventional mortgage.

Art. 3342 (3314). Conventional mortgage is acquired only by consent of the parties, and judicial and legal mortgages only by the effect of a judgment or by operation of law.

But these mortgages are only allowed to prejudice third persons when they have been publicly inscribed on records kept for that purpose, and in the manner hereafter directed.

Art. 3343 (3315). By the words third persons used in the foregoing article, are to be understood all persons who are not parties to the act or to the judgment on which the mortgage is founded.

Art. 3345 (3317). All mortgages, whether conventional, legal or judicial, are required to be recorded in the manner hereafter provided.

Art. 3346 (3318). The inscription of mortgages only binds the property of the debtor, when it has been made in the office of mortgages for the parish where the property lies.

If the debtor has immovable property lying in more than one parish, the inscription ought to be made in the office of mortgages for each of them.

Art. 3347 (3319). No mortgage or privilege shall hereafter affect third parties unless recorded in the *parish* where the property to be affected is *situated.*

Art. 3369 (3333). The registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of its date; its effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made.

But this rule does not obtain with regard to the mortgages to which husbands are subjected for the dowry and other claims of wives, and tutors and curators towards minors, interdicted and absent persons, whose estates they administer.

The reinscription of mortgages is also dispensed with in certain cases provided for by special laws.

EXTRACT FROM ACT OF 1876, No. 14, INCORPORATING THE NEW ORLEANS PACIFIC RAILWAY COMPANY, pp. 30, 31:

* * The said Company is empowered and authorized

* * * * * * * *

Fifth. To obtain and receive by purchase, grant from the United States or otherwise * * * both real and personal property.

EXTRACT FROM SUPPLEMENTAL ACT OF 1878, No. 12, p. 37:

* * The said Company shall have power * * * for securing the payment of said bonds or notes * * * to mortgage in advance all such *rights, titles, properties* and franchises as the said Company may hereafter acquire, whether such property be real or personal, and whether in possession or not, or any portion of the same.

EXTRACT FROM CONSTITUTION OF LOUISIANA OF 1868.

ART. 123. * * * No mortgage or privilege shall hereafter affect third persons unless recorded *in the parish where the property to be affected is situated* * * *

EXTRACT FROM CONSTITUTION OF LOUISIANA OF 1879.

ART. 176. No mortgage or privilege on immovable property shall affect third persons unless recorded or registered *in the parish where the property is situated*, in the manner and within the time as is now or may be prescribed by law. * * *

SUPREME COURT OF THE UNITED STATES.

No. 137 of October Term, 1891.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY ET AL., APPELLANTS,

versus

JOHN D. PARKER ET ALS., APPELLEES.

It is hereby stipulated that in printing the record in this cause, the list of selections—of lands—by the New Orleans Pacific Railway Company, referred to as exhibits of the bill, may be omitted from such printed record, with leave, however, to either party or to the Court to refer to the lists, in the manuscript transcript on file, as may be deemed necessary, the object of this agreement being to save needless expense.

A. H. LEONARD,
Attorney for Plaintiff J. D. Parker.
HOWE & PRENTISS,
W. W. HOWE.

NEW ORLEANS, August 1st, 1891.

As counsel for Hamlin, administrator, co-complainant and one of appellees, I agree to foregoing and also that the patents offered by complainants need not be copied in the transcript of appeal, but that the form of one of them only be inserted.

ALFRED GOLDTHWAITE,
For Appellee Hamlin, Administrator.

OCTOBER 13th, 1891.

[*Record No. 13,148.*]

SUPREME COURT OF THE UNITED STATES.

No. 137, October, 1891.

The New Orleans Pacific Railway Company Et Al., Appellants,

versus

John D. Parker Et Als., Appellees.

To complete the transcript made by the late clerk, and correct its arrangement and clerical errors, it is agreed and consented:

That the "statement of evidence adduced in said cause," and "note of evidence of respondents" being pp. 25 and 26 of printed record or transcript, were the offers and stipulations in open Court at the final hearing October 26, 1887, by and on behalf of the respective parties appearing in the cause; and the several documents *preceding* said statement or notes of evidence from pp. 11 to 24, inclusive, are documents offered by complainant and co-complainant, as so stated at p. 25. A document also so offered, but lost, showed that the mortgage of 1870 was recorded in the Parish of St. Landry in October, 1870.

The evidence so offered by the respondents, save that omitted by consent, as noted at p. 26 and elsewhere, is found at pp. 38 to 77, inclusive, and pp. 92 to 97, inclusive; the maps "L. G. 3," referred to in testimony of E. B. Wheelock, p. 43, being interleaved between pp. 96 and 97.

The motion or protest as to form of decree mentioned in minutes of February 20, 1888, pp. 99, as having been filed by respondents, is hereto annexed in certified copy, and having been omitted by said clerk, may be added to the transcript at p. 99.

The minute entries set forth at pp. 107 to 111 of transcript, should have been inserted prior to the clerk's certificate, and may be considered as if so inserted.

The following errata are also agreed to:

Page 2, line 30, after "in" insert "coin;" and in line 41, after "not" insert "to."

Page 7, last line, after "also" insert "all."

Page 7, second line from bottom, for "New Orleans and Pacific Railroad," read "New Orleans Pacific Railway."

Page 8, line 13 from top, after "to" insert "the New Orleans Pacific Railway Company as assignee of."

Page 9, line 18, for "on" read "in;" and in 21 line before "subordinate" insert "and."

Page 12, line 21, for "the" read "their."

Page 36, last line, for "18th" read "17th."

Page 43, line 1, for "respondent" read "respondents;" and for "offers," "offer."

Page 83, line 26, for "lands" read "bonds;" and in line 40, for "patented" read "prior."

Page 100, 3 line from bottom, after New Orleans insert "Pacific."

Page 21, second line, after "of" insert "way."

Page 102, line 18, for "by" read "to;" and in line 35, for "respondent" read "respondents."

Page 78, in title of cause in replication, after "N. O. B," insert "R."

Page 90, in title of cause after "&" insert "V."

It is further agreed that all Acts of the General Assembly of Louisiana, and of Congress, mentioned in the pleadings and notes of evidence, may be referred to by the parties in the published statutes.

A. H. LEONARD,
Attorney for Complainant Parker.
W. W. HOWE,
For Respondents, Appellants.

Alfred Goldthwaite
for Admr of Hamlin, deceased

UNITED STATES CIRCUIT COURT

WESTERN DISTRICT OF LOUISIANA.

JOHN D. PARKER, W. A. HAMLIN, Co-Complainant,

versus [No. 94

NEW ORLEANS, BATON ROUGE & VICKSBURG RAILROAD Co. Et Als.

To the Honorable A. Boarman, Judge:

It being proposed by complainant Parker, that there should be two final decrees entered in this cause, one in his favor and one in favor of co-complainant, Hamlin; the New Orleans Pacific Railway Company and John F. Dillon, and Henry M. Alexander, trustees, beg leave to submit that the only claim against them is upon an alleged mortgage which is indivisible, and that but one decree should be entered as proposed also by co-complainant, Hamlin, and they therefore submit this protest.

HOWE & PRENTISS,
DILLON & SWAYNE,
For said Respondents.

FEBRUARY 20th, 1888.

CLERK'S OFFICE U. S. CIRCUIT COURT, WESTERN DISTRICT OF LOUISIANA.

I hereby certify the above is a true and correct copy of the original on file in my office.

Witness my hand and Seal of said Court at the City of Shreveport, La., this the 24th day of October, A. D., 1891.

J. B. BEATTIE,
Clerk.

Office Supreme Court U.
FILED,
DEC 7 1891
JAMES H. McKENNEY.
CLERK

SUPREME COURT OF THE UNITED STATES.
No. 137, October, 1891.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY Et Al., Appellants,
versus
JOHN D. PARKER Et Als., Appellees.

The following opinion rendered in this cause by the lower Judge was not annexed to the transcript, as provided by the rule, because it had not been filed. It is now printed, and agreed to be annexed, as found in Parker vs. New Orleans, etc., R. R. Co., 33 Fed. Rep. p. 693:

OPINION.

BOARMAN, J. The complainant, J. D. Parker, a citizen of Illinois, being a *bona fide* holder of one bond for $1,000, with.....interest coupons attached, sues for amount of overdue coupons, for foreclosure, and for general relief. W. A. Hamlin holds five of the same kind of bonds, and joins in the bill, adopts its allegations, and asks for same relief. The bill is brought against the New Orleans, Baton Rouge and Vicksburg Railroad Company, domiciled at New Orleans, Louisiana; S. D. McEnery, Governor of Louisiana; the Union Trust Company, of New York; J. F. Dillon and Henry Alexander, of New York; and the New Orleans Pacific Railway Company, of Louisiana.

The defendant Company, the Union Trust Company, and S. D. McEnery, made no appearance, and judgment *pro confesso* was entered against them. The New Orleans Pacific Railway Company, J. F. Dillon, and Alexander answered.

In their answers are set up the following defenses: (1) that future property cannot be mortgaged under the laws of Louisiana; (2) that the future property, claimed to have been included in the mortgage act, was not so described as to notify third persons; (3) that the lands granted by Congress by act March 3, 1871, never vested in the defendant Company; (4) that the mortgage act to secure the bonds was never reinscribed; (5) that the lands granted by Congress to defendant Company were not embraced in the terms of the mortgage act.

Before considering these defenses, and the issues made by the pleadings, let us recite, substantially, such of the evidence as is necessary to be considered in this case.

By an act of the Louisiana Legislature of December 31, A. D. 1869, certain persons were constituted a body corporate, under the name of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and they were invested with power to construct a railroad from New Orleans to any point on the boundary line dividing the States of Mississippi and Louisiana with a view of continuing such railway to Vicksburg, in Mississippi, with branch lines to Baton Rouge and thence to Shreveport, and to such other points on the Mississippi River as may be deemed advisable, and to connect the main lines with the roads of other Companies, and with mines and manufacturers in Louisiana. The capital stock was to be $1,000,000, and an organization was to be effected as soon as $500,000 was subscribed and 5 per cent. thereon paid in. An organization was effected, and in October, 1870, the Company issued first mortgage construction bonds to the amount of ....., and to secure their payment executed the mortgage set up by complainants. The property subjected to the mortgage is recited in the act to be as follows:

"The whole of the main line of railroad and its branches and connecting lines, including a branch line commencing at the City of Baton Rouge, and extending thence through certain named parishes" * * * "to Shreveport, and also a branch road commencing at the main line in the Parish of East Baton Rouge, and extending through" certain named parishes "* * * to the Mississippi River at the City of New Orleans, together with all the rights of way, roadbed, rails, depots and stations, shops, buildings and engines, cars, tenders, and other rolling stock; also all real and personal estate within the State of Louisiana owned by said Company at the date of the mortgage or which may be acquired by it thereafter, appurtenant to, or necessary for the operation of said main line of said railroad or any of said branches connecting with the said main line, or to be connected therewith. Also all other property, real and personal, of every description and kind whatsoever and wheresoever situated in the State of Louisiana, which is now owned, or shall be hereafter acquired, by said Company, and which shall be appurtenant to, or necessary for

the operation of said main line of railroad, or any of said branches. Also all the tenements, hereditaments, and appurtenances thereunto belonging, and all of the estate, right, title and interest, legal and equitable, of the said Company and its successors and assigns therein, together with the corporate franchises and privileges of said Company, at any time granted, or to be granted, by the State of Louisiana relative to the construction, operation or use of said railroad within said State."

By act March 3, 1871, incorporating the Texas Pacific Railway Company, lands were granted to the defendant Company to aid in the construction of a railway from New Orleans to Baton Rouge; thence, by way of Alexandria, to connect at Shreveport with the Texas Pacific Railway. November 11, 1871, the defendant Company filed, in the general land office, a map designating the route of the line from Baton Rouge, via Alexandria, to Shreveport. In 1881 defendant Company transferred, by act of conveyance, all the lands which had been granted to it by Congress March 3, 1871, to the New Orleans Pacific Railway Company, one of the parties defendant in this suit. In March, 1881, the United States issued patents to said New Orleans Pacific Railway Company for 679,287 acres of land, situated in different parts of the State. The mortgage act to secure the defendant Company's bonds was recorded in New Orleans in 1870. It was also recorded in several of the parishes through which the main line and branches were to run.

At the time of the assignment of the lands to the New Orleans Pacific Railway Company, no work on the main line or branches had been began or done by defendant Company.

The defenses relied on by defendants will be considered in the order in which they have been herein stated. The principles and rules of equity are administered in the Federal Courts in Louisiana as they are elsewhere in the Union.

1. In equity, future property may be mortgaged. A railroad company authorized to borrow money and issue bonds to enable itself to construct and stock its road, may mortgage such property as it may acquire in the future, and as soon as the property is acquired the mortgage operates on it. 1 Jones Mortg. Sec. 153; *Shaw vs. Bell*, 95 U. S. 10;

2 Story, Eq. Jur. Sec. 1040; *Pennock vs. Coe*, 23 How. 117; *Dunham vs. Railway Co.*, 1 Wall. 254; *Mitchell vs. Winslow*, 2 Story, 630; *Pierce vs. Emery*, 32 N. H. 484.

The jurisprudence of Louisiana on this subject shows that Article 3308, Revised Civil Code, does not forbid juridical persons to mortgage future property. In this respect such persons are governed by legislative enactments. Under act of the Louisiana Legislature No. 145, session 1854, and Act 341, session 1855, a railroad company may mortgage its road, completed and to be completed; and by act No....., session 1856, such companies are authorized to mortgage their franchises and all property to aid in the construction of their railroads. These several Statutes were re-enacted in Sections 726, 727, 2396. 2397 of the Revised Statutes. In the case of *Bell vs. Railroad Co.*, 34 La. An. 785, the Louisiana Supreme Court held that a railway company may mortgage its franchises, and all of its property, present and prospective. The defendant Company's charter shows an express power to mortgage future property.

2. In the case just cited it was held that the mortgage "attaches to property subsequently acquired as effectively as if it had been described specifically in the act; it being entitled to the same effect as if it had been a judicial mortgage." Obviously, it would be difficult, if not impracticable, for a railway company to specifically describe future property that might be acquired by grant or otherwise, and the generality of the language used in the mortgage act should not be fatal objection to the legal efficacy of the act relied on by complainants. *Wilson vs. Boyce*, 92 U. S. 325; *Jackson vs. Delancey*, 4 Cow. 427; *Pond vs. Bergh*, 10 Paige, 140.

3. The New Orleans Pacific Railway Company claims to be, and doubtless is, the assignee of the lands granted by Congress, and, as such assignee, the government has issued patents to it for 679,287 acres of said lands; therefore, it is contended by complainants that said Company should not be heard to dispute that title vested by reason of said grant in defendant Company. Whether this contention be correct or not, it seems to be clear that Congress, in using the words "there is hereby granted to said Company" alternate sections, etc., intended to make, and did make, a grant *in præsenti* to the defendant Company. In

Railway Co. vs. Railway Co., 97 U. S. 496, the Court, speaking of the legal effect of such words in a grant as "there is hereby granted," etc., say they "import a grant *in præsenti*, not one *in futuro*, or the promise of a grant." * * * "It is true that the route of the road, in this case as in those cases, to aid in the construction of which the act was passed, was to be afterwards designated, and until designated, the title could not attach to any specific tracts. The grant was of sections afterwards located, and this location depended on the route established. When that was settled, the location became certain, and the title that was previously imperfect acquired precision, and attached to the lands." *Schulenberg vs. Harriman*, 21 Wall. 60; *Railroad Co. vs. U. S.*, 92 U. S. 738.

4. It is provided by statute that mortgages executed by by railway companies in Louisiana to raise money for their construction need not be reinscribed. Rev. St. La. § § 726, 727, 2396, 2397.

5. Are the lands which were granted to the defendant Company subjected to the mortgage executed to secure these bonds? The effort to solve this question leads us into difficulties which often attend the interpretation of the most carefully written agreements. In judicially determining whether or not the act we are now considering operates on the lands in question, we are authorized, under well established rules of law, to consider the language used in the act; the extent and nature of the authority of the contracting parties; the intention, object or purpose they had, or may have had, in so contracting; the character and use of the property subjected to the mortgage, and circumstances attending its execution. 3 Wood Ry. Law, 1617; *Smith vs. McCullough*, 104 U. S. 25. The right and authority of defendant Company to subject all of its present and prospective property, as well as its franchises and privileges, to this mortgage, seems to be clearly shown by the laws of Louisiana, and by its charter. It seems, too, to be well settled that when a railway company is empowered by its charter to mortgage all of its property, privileges, and franchises after acquired property passes as an incident to the franchise to acquire property by a mortgage of the franchise and property of the Company. Such a mortgage seems to be a conveyance of the property and franchises of the Company as an

entire thing. *Pierce vs. Emery*, 32 N. H. 484; *Phillips vs. Winslow*, 18 B. Mon. 431; *Willink vs. Bankling Co.*, 4 N. J. Eq. 377. Under this principle a mortgage given by a railroad company on its franchises and road to be thereafter built, covers a branch road not in contemplation at the time of the mortgage. *Coe vs. Railroad Co.*, 4 Amer. and Eng. R. Cas. 513.

Such circumstances as may be gathered from the evidence shows that a great scheme for building a railway from New Orleans to Vicksburg, with branch lines to Baton Rouge and Shreveport, and to such points on the Mississippi River as may be thought advisable, and to connect the main lines with the railways then being built, or in operation, in adjoining States, and with mines and factotories in Louisiana, engaged the attention and effort of certain persons, who obtained a charter granting the amplest powers to build the New Orleans, Baton Rouge and Vicksburg Railroad, from the State legislature. The capital stock was fixed at $1,000,000; the subscriptions at $500,000; and, as soon as $25,000 was paid in, the company was organized. In the act the State gave the right of way through public lands, and authorized the issuance of second mortgage bonds to the amount of $12,500 per mile of the main line and branches, the bonds to bear 8 per cent. interest, to be guaranteed, principal and interest, by the State, and to be secured by a mortgage on all the property owned by the Company at the date of the mortgage, or which might thereafter be acquired. The Company was also authorized to issue first mortgage construction bonds, to be secured by a mortgage on the property described in the act which is herein quoted. In addition to all this, aid was solicited, and obtained by the defendant Company from the Government. Congress, in the March following the issuance of these bonds, having before it the bill to incorporate and aid in the building of the Texas Pacific Railway, granted, in that bill, over $1,000,000 acres of land to the defendant Company. Rich in franchises and munificent land grants, the Company had no money beyond the paltry sum of $25,000 paid in on subscriptions. The Company issued 6,250 bonds, each for $1,000, payable in forty years, with 8 per cent. interest in New York, or two hundred pounds sterling at London. The bonds are dated October, 1870. The act granting the lands was ap-

proved March 3, 1871. It is contended by complainants' counsel, and we think with a great deal of force, that it was, at the time these bonds were issued, a matter of public history, of which the Court should take cognizance, that the bill to incorporate the Texas Pacific Railway Company—the act in which the land grant was made to defendant Company—was, and had been for some time, pending in Congress, and though the act was not a law until after the issuance of the bonds, the incorporators of the defendant Company expected, and had reason to believe, the said act would become a law, and the recitals in the bonds were intended to convey the idea to all concerned that the mortgages given to secure the bonds would operate on all the lands granted by Congress to aid in the construction of the New Orleans, Baton Rouge and Vicksburg Railroad. From the salient facts and circumstances which this case discloses, it is difficult to avoid the conclusion that the incorporators, having so great an enterprise on hand, with a subscription of $500,000, and only $25,000 of that amount paid in; the Legislature, anxious to have the public work completed; and all parties interested, expected the main lines, over 500 miles in length, to be constructed with the money derived entirely from the sale of these bonds. The Company had the power to subject the lands that would be covered by the grant which was, at the time of the mortgage, being solicited from the Government, and which Congress shortly afterwards granted to defendant Company, to a mortgage to secure the payments of any bonds it might issue in aid of its main lines and branches. And when we consider its ample powers and the circumstances attending its organization and purpose, it seems to be reasonable to conclude that the directory of the company intended to exhaust all their power and means to make the bonds now sued on an attractive and safe investment for capitalists. In the very nature of things it seems that they, as well as the public, could look alone to the successful negotiation or sale of these bonds for money to carry out their great purpose.

The draughtsman of the mortgage act, in his effort to show clearly, and emphasize by special and general recitals, what property was subjected to the mortgage, after using language, a critical analysis of which shows that the mortgagor intended to subject to the mortgage all the

property, present and prospective of the company,—that is the "whole road," using the word road as synonymous with corporation, as was done by the Court in *Pierre vs. Emery*, 32 N. H. 484, as a whole thing, with all its corporate rights and franchises, and incidentally, and by way of accession, all of the subsequently acquired property of the road, concludes his description of the property by adding the following language: "Also the tenements, hereditaments, and appurtenances thereto belonging, and all *the estate, right, title, and interest, legal and equitable*, of the said company and its successors and assigns therein, together with all the corporate franchises and privileges of said company at any time granted, or to be granted, by the State of Louisiana, relative to the construction, operation, or use of said railroad within said State." Suppose the defendant Company, having authority to sell, had sold the property described in the mortgage act, could not the vendee, in a suit at law, vindicate title to the lands in question? Would it be held that the said lands were not embraced in an act of sale in which such language as found in this mortgage was used?

The same words which, when used in act of sale, import a conveyance of certain lands must, when they appear in act of mortgage, import a mortgage of those lands. *Manufacturing Co. vs. Bank*, 119 U. S. 191, 7 Supreme Court Rep. 187.

The New Orleans Pacific Railway Company, by way of illustrating the inequitable character of complainant's demands, says the New Orleans, Baton Rouge and Vicksburg Railroad Company never built any of the railway contemplated in its charter, and therefore never earned a foot of the land grant. The contention as to the defendant Company never having built any of the road is true as a fact; but if it be true in law that title vested, by reason of the grant, in defendant Company, and that filing the map designating the route in the general land office caused the title which was previously imperfect to acquire precision and attach to the lands mentioned in the grant, the fact as to whether any of the lands were earned by defendant Company becomes a matter about which the grantor, and not the assignee, may inquire. Between the New Orleans Pacific Railway Company and the grantee, the defendant Company, to whom Congress saw fit, under such

conditions as public policy suggested, to give the lands, there can be no question under the facts in this case, for the Court's consideration as to whether one or the other, or neither of the parties earned the lands in question. There may or may not have been conditions imposed by Congress on the grantee, the failure to comply with which would have authorized Congress, by proper proceedings, to withdraw the lands from defendant Company. But, so far as we are advised, the grantor has done nothing beyond allowing the assignment of the lands to the New Orleans Pacific Railway Company, to affect the title which was vested in the defendant Company by the act March 3, 1873. And it is well settled that no individual can assail the title the Government has given, on the ground that the grantee has failed to perform the conditions, if any, imposed on the grantee. *Schulenberg vs. Harriman*, 21 Wall. 44. The New Orleans Pacific Railway Company took the lands as they were held by defendant, subject to all liens in equity or in law, imposed on them in favor of the *bona fide* holders of these bonds. There was no withdrawal of the lands by the grantor, and no new grant of them made to the New Orleans Pacific Railway Company.

It was the policy of the Government, probably at the solicitation and in the mutual interest of both companies, to allow and sanction the transfer of the lands, and the New Orleans Pacific Railway Company became the assignee, with full knowledge of all the facts. Notably among these facts it was known that the grant was one *in præsenti*, not one *in futuro*, or a promise to make a grant; that defendant Company had in November, 1871, filed a map designating the route from Baton Rouge, via Alexandria, to Shreveport, and that by filing such a map, the title to the lands, previously imperfect, acquired precision, and attached to the lands; that the mortgage subjecting these lands to secure the payment of the bonds was registered at the company's domicile; that, whatever rights, in equity or in law, the mortgagees have, were vested in them prior to the transfer, and such rights cannot be affected by any equities which might appear to be in the New Orleans Pacific Railway Company because of the fact that that company constructed a railway from Baton Rouge, via Alexandria, to Shreveport. The facts and authorities show that whatever rights

remained in the Sovereign grantor, after the passage of the act under which the land grant was made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, the title of the lands passed *in præsenti*, and was completed to that Company when Congress, in the interest of public policy, allowed or provided for their assignment. Congress did not make any effort to retake the lands, or make a new grant of them to the New Orleans Pacific Railway Company, and we may fairly presume that its action in allowing the transfer of the lands, was based on the view of the facts and law herein suggested. Considering that the lands at the time of the transfer were affected by complainant's mortgage rights, and that this suit can affect no property of the New Orleans Pacific Railway Company, the assignee under the favor of the government, and that complainant was in no way a party to the transfer, I do not think the facts set up by the assignee to show the absence of equity in complainant's demand can be heard to affect the rights he clearly had at the time of the said transfer. A decree will be entered for complainant[s].

Office Supreme Court U. S.
FILED.
DEC 15 1891
JAMES H. McKENNEY.
CLERK

SUPREME COURT OF THE UNITED STATES.

No. 137, October, 1891.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY ET AL., APPELLANTS,

versus

JOHN D. PARKER ET ALS., APPELLEES.

On behalf of appellee Hamlin the case is submitted on the opinion of the "Lower Judge," which is found in 33 Federal Reporter, p. 693, and which has been printed by the appellants and filed in this Court.

ALFRED GOLDTHWAITE,
Solicitor for Hamlin, Administrator.

Office Supreme Court U. S.
FILED,
DEC 12 1891
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

October Term, 1891.

No. 137.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY ET AL.

versus

JOHN D. PARKER ET AL.

Brief and Argument of Counsel for John D. Parker, Appellee.

A. H. LEONARD,

Of Counsel for Appellee, John D. Parker.

L. GRAHAM & SON, 99, 101, 103 GRAVIER ST., N. O.

SUPREME COURT OF THE UNITED STATES.

October Term, 1891.

No. 137.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY ET AL.

versus

JOHN D. PARKER ET AL.

Brief and Argument of Counsel for John D. Parker, Appellee.

THE PLEADINGS

Are stated in detail in brief for appellee on motion to dismiss, pages 9 to 14 inclusive.

STATEMENT OF CASE.

The case is clearly stated in the very able opinion of the learned judge *a quo*, which is not in the printed record, as it should be, but will, it is understood, be added thereto. This opinion is reported in 33 F. R. 693.

This is a bill in equity to foreclose a mortgage.

On October 1, 1870, the New Orleans, Baton Rouge & Vicksburg Railroad Company issued its First Mortgage

Construction Bonds, each for $1000, payable October 1, 1910, with interest coupons attached, payable semi-annually; and to secure payment of same, executed a mortgage, duly recorded, on all its real and personal estate within the State of Louisiana, then owned or which might thereafter be acquired by said company, appurtenant to its main line or to any of its branch lines—a line from Baton Rouge by way of Alexandria to Shreveport, intended to connect the main line with the Texas & Pacific Railway Company, being one of said branches.

By act of Congress, March 3, 1871, incorporating the Texas & Pacific Railway Company, lands were granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company *to aid in the construction* of a road from New Orleans to Baton Rouge, thence by way of Alexandria to connect with the line of the Texas & Pacific Railway Company.

In 1881, the New Orleans, Baton Rouge & Vicksburg Railroad Company transferred and assigned these lands to the New Orleans & Pacific Railway Company.

In March, 1885, patents were issued by the United States to the New Orleans Pacific Railway Company as *assignee* of the New Orleans, Baton Rouge and Vicksburg Railroad Company, for $679,287\frac{64}{100}$ acres of land in Louisiana.

The appellee, John D. Parker, holder of two of said bonds, sues on the matured coupons thereon, avers said land is subject to said mortgage, and prays for foreclosure, etc.

One Walter A. Hamlin, claiming to be holder of five of said bonds, intervened on the matured coupons thereon. The New Orleans Pacific Railway Company, John F. Dillon and Henry F. Alexander are the only defendants in court *a qua* who there appeared. As against the other merely *nominal* defendants in that court a judgment *pro confesso* was entered.

Separate decrees were rendered in favor of Parker and Hamlin, from which the New Orleans Pacific Railway Company, Dillon and Alexander have appealed.

I.

It was contended in court *a qua* by counsel for defendants below:

1. That under the law of Louisiana future property can not be mortgaged.

2. That the future property was not so described in the act of mortgage as to notify third persons by registry.

3. That the execution of the bonds and mortgage declared on was not authorized by the N. O., B. R. & V. R. R. Co.

4. That the lands granted by Congress are not embraced in the terms of the mortgage.

5. That the lands so granted were "earned" by the N. O. P. R. Co., who thereby are invested with superior equities.

With regard to the first point, it is sufficient to say that the charter of the New Orleans, Batc
burg Railroad Company by the Stat
pressly authorized the company to issu
construction bonds and to secure payment of same by a mortgage on all its real and personal property owned at the date of such mortgage or which might thereafter be acquired and on its corporate franchises, rights and privileges. Acts of Louisiana, 1870, p. 7; Act No. 143, Sec. 16, p. 14. Sections 14- 24. 27

Moreover, even without this express authorization to mortgage future property, if the lands granted by Congress were included in the terms of the mortgage, it is clear under the settled jurisprudence of Louisiana that

when acquired by the mortgagor they became *eo instanti* subject to the mortgage. Civil Code Louisiana, Article 3304.

We propose to show that counsel err when they assert that under the law of Louisiana a railroad company can not mortgage future property; before doing so, however, the attention of the court is directed to the fact that this is a cause in equity.

The equitable jurisdiction of the Federal courts attaches in Louisiana just as it does in other States, and causes in equity instituted in Louisiana in such courts must be determined by the rules and principles of equity. In equity future property can be the subject of a conventional mortgage.

It is the general rule of the common law that future property can not be mortgaged, but the rule of the civil law is different.

"Those who bind themselves by any engagement whatever may, for the security of their performance of the engagement on ther part, appropriate and mortgage not only the estate they are masters of at the time of contracting, but likewise all the estate which they shall be afterwards seized or possessed of." 1 Domat, Cushing's Ed. 649, Art 5.

With reference to the sale or mortgage of future property, equity has adopted the principles of the civil law.

"Courts of equity give effect to assignments of trusts and possibilities of trusts and contingent interests and expectancies, whether they are in real or personal estate, and will support assignments not only of contingent interests and expectancies, but also of things which have no present actual or potential existence, as a present contract to take effect and attach as soon as the thing comes *in esse*."

Story Eq. Jurisprudence, 2d vol., Sec. 1040, p. 387.

In Winslow vs. Mitchell ed Story 630, 644, Judge Story states the rule to be: "That whenever the parties by their "contract intended to create a positive lien or charge "either upon real or personal property, whether then "owned by the assignor or contractor or not, or if per- "sonal property, whether it is then in being or not, it at- "taches on equity as a lien or charge upon the particular "property as soon as the assignor or contractor acquires a "title thereto, against the latter *and all persons asserting* "*a claim thereto under him* either voluntarily or with "notice or in bankruptcy."

See also Wellinck vs. Morris Canal Company, 3 Greens Chy. 377.

Pierce vs. Emory, 32 N. H. 484.

Farmers' Loan and Trust Company vs. Henderickson, 25 Barb. 484.

Fisk vs. Potter, 2 Abb. 138.

Stevens vs. Watson, 4 Abb. 302.

Watson vs. Campbell, 28 Barb. 421.

Benjamin vs. Elmira Railroad, 29 Barb. 441.

"Whenever a mortgage is made by a railroad company "to secure bonds, and the mortgage declares it shall in- "clude all present and future acquired property, as soon "as the property is acquired the mortgage operates upon "it. In other words, it seizes the property and operates "upon it by way of estoppel as soon as it comes into "existence and is in possession of the mortgagor, and the "mortgagees have a prior equity to the claims of cred- "itors obtaining judgments and executions after property "is thus acquired and placed in the possession of mort- "gagor. Such is the settled law of the federal courts "and generally of the State courts."

Jones' Mortgages, Vol. 1, Sec. 153.

This, of course, applies also to any subsequent *vendor*. In Pennock vs. Coe, 23 Howard, 117, this court held that

"A raiload company authorized to borrow money and "issue their bonds to enable themselves to finish and stock "the road may mortgage not only the then acquired prop- "erty, butsuch as may be acquired in future."

See also 5 Otto 10, and Dunham vs. R. R., 1 Wall. 254.

The law of Louisiana is in accord with the law of her sister States and of all civilized countries with regard to mortgages of future property by railroad companies. It is true that Article 3308, Civil Code, declares, "Future "property can never be the subject of conventional mort- "gage," but in Bell vs. R. R. Co., 34 La An. 789, it was held this article applies "only to individuals in their "ordinary transactions. It has no reference to juridical "persons" governed in this respect by other laws.

Article 3308 was Article 3276 of the Code of 1825, and was modified by subsequent legislation. For some years the General Assembly by special acts authorized particular corporations to mortgage future property, and finally in 1854 passed a general law authorizing any railroad company to mortgage their road in whole or in part, and providing that such mortgage, if made of the entire road, shall bear upon the entire road, though the same be not completed at the time the mortgage was made. Acts 1854, No. 145, p. 112.

The provisions of this act were again set forth *totidem verbis* in an act to regulate corporations generally, passed in 1855, No. 341, p. 485. Again in 1856, by an act "To extend the powers of railroad companies," any railroad company was authorized to borrow money required for the construction of the road, and for this purpose was authorized to issue bonds secured by mortgage upon the *franchises* and *all* the property of said companies. Acts 1856, p. 305, No. 194.

The Supreme Court of Louisiana, in case of Bell vs.

R. R. Co., after reciting these various acts and commenting upon them, held (we quote now from syllabus 34 An. La. 785): "The prohibition against mortgaging future "property found in the Civil Code relates to ordinary "transactions between individuals, and do not apply to "railroad corporations, which are by their charters and "by general legislation concerning such companies au- "thorized to mortgage for construction and repair pur- "poses their road, completed or not, and therefore their "actual and *future* property.

"When a railroad company is authorized to mortgage "for stated purposes its road, completed or not, a mort- "gage given to secure bonds issued for those objects and "recorded *will attach to property subsequently acquired* "as effectually as if it had been described specifically in "the act, it being entitled to the same effect as if it "were a legal or judicial mortgage, when duly recorded."

Turning now to the body of the decision, we find it holds as follows:

"Laws have consequently been passed for the special "benefit of railroad corporations on the subject of mort- "gages, and are to be found either in their respective "charters or in general statutes referring to them. The "title of the defendant originates in the deed by which "the railroad company mortgaged its lands, franchises, "right of way, rolling stock, real and personal property "owned or *to be thereafter acquired*, without any excep- "tion or reservation, to secure the payment of the bonds "designed to obtain the money necessary to accomplish "the purpose heretofore stated, viz: to construct the road. "The authority to borrow money and make such a mort- "gage for the continuation and maintenance of the road "in this State is conferred in the charter granted, and in "statutes which apply to railroad corporations. These "statutes have the physiognomy of those which have been

"adopted *in pari materia* in other States of the Union, "and which form part of the law of railroad corporations. "The operation and extent of these statutes have been "uniformly judicially determined."

The court thereupon cite and quote from a number of decisions by Federal and State courts, among others, Pennock vs. Coe, 23 Howard, 117; Durham vs. R. R., 1 Wall. 254, and summing up, say: "These adjudications "are substantially to the effect that when the power is "given to a railroad company to contract for loans, and to "mortgage its property to secure the payment of the "debt, it conferred that of mortgaging the franchise to "maintain the railroad and take tolls and *all* its property, "present and prospective." 34 An. La., p. 792.

The learned counsel for appellants, in their brief filed in court *a qua*, cited the case of Bell vs. Chicago Railroad Co. This was bold, but it was still more bold to say, as counsel did: "The court (in Bell case) went "into considerable *disquisition*, but the point of it all is "that the general statutes allow a railway company to "mortgage, not future property unconnected with it, but "such future property as should become part of the organism."

It is difficult to imagine how counsel can justify that assertion, when, as has just been shown, the court in the Bell case says explicitly that a railway company may mortgage "its franchise and *all* its property, present and *prospective*."

There can be no reasonable doubt that the Supreme Court of Louisiana in deciding the Bell case took occasion to consider the law of Louisiana with reference to the power of railroad companies to execute mortgages, and finding it to be in accord with that of other States held, in conformity to numerous decisions of Federal and State courts, that in Louisiana a railway company may mortgage

"its franchise and all its property, present and prospective," to secure payment of bonds issued to obtain money with which to construct its road.

If the case State vs. Mexican Gulf R. R. Co., 3 R. La. 518, cited in court *a qua*, announces a contrary view it is overruled by the Bell case. It is to be observed, too, that the case in 3d R. was determined long prior to the general legislation of the State with regard to corporations.

Counsel stated to judge *a quo* that in the Mexican Gulf case it was declared that a railway mortgage could not exist or be made in derogation of the general hypothecary system of the Civil Code without special legislative authority. The case will be sought in vain for any such declaration.

It was not so declared, and could not have been so declared, since the court certainly knew that the General Assembly had full power (exercised since that decision) to enact general laws authorizing railway companies to mortgage future property.

In the Mexican Gulf case it was claimed a mortgage resulted from a certain legislative act. The court found otherwise and said: "The act does not create the mortgage, nor could it without the consent of the corporation." It was held, of course, that there was no mortgage.

It is clear that under its charter, under the rules of equity, under the statutes of Louisiana, and under the settled jurisprudence of that State, the New Orleans, Baton Rouge & Vicksburg Railroad Company could validly mortgage its future property.

II.

It is contended on behalf of appellees that the mortgage executed by the New Orleans Baton Rouge & Vicksburg Railroad Company is without effect as to third persons,

because the *future* property was not so described in act of mortgage as to notify third persons by registry.

Learned counsel said in court *a qua*, "A consideration "of our system of mortgages and registry should effect- "ually dispose of complainant's demand."

This proposition is somewhat vague.

Inferentially, "our system" means the Louisiana system.

This inference is, however, rebutted by the fact that counsel refer to 103 U. S. 281, and 108 U. S. 514, and do not cite any case decided by our State courts.

In search of light, we turn to cases mentioned, and find that in 103 U. S. 281, this court held that a mortgage has no effect as to third persons unless recorded, and in 108 U. S. 514, held that the provision in the Constitution of Louisiana of 1868 abolishing tacit mortgages did not impair the obligation of contracts. These decisions do not seem to bear on the point in controversy.

But, counsel say, a mortgage must contain some description of the immovables which will at least indicate their existence and character, and cite Civil Code, Art. 3306.

A somewhat more extended "consideration of our system of mortgages" will show that there are mortgages which attach to property subsequently acquired by the mortgagor, and not in any manner referred to in the mortgage. Every legal and every judicial mortgage has such effect.

Civil Code, Art. 3320: The creditor who has a legal mortgage may exercise his rights on all the immovables belonging to his debtor, and on such as may subsequently belong to him.

Civil Code, 3329: The judicial mortgage may be enforced against all the immovables which the debtor actually owns, or may subsequently acquire.

Article 3306 does not and can not apply to a mort

gage executed by a railroad company on its future property. As was decided by the Supreme Court of Louisiana in case Bell vs. R. R. Co., hereinbefore cited, such mortgage "attaches to property subsequently acquired as ef-
"fectually as if it had been described specifically in the
"act, it being entitled to the same effect as if it were a
"legal or judicial mortgage."

When (as in case at bar) a railroad company is authorized by its charter and by general laws to mortgage its future property, it necessarily follows that Article 3306 of the Civil Code can not apply, since it is impossible to state in such mortgage "precisely the nature and situation of each of the immovables" which in the future the company may acquire.

In the mortgage under consideration, the N. O., B. R. & V. R. R. Co. mortgages "all property real or personal
"of every kind and description whatsoever and whereso-
"ever situated now owned or which shall be hereafter
"acquired by said company."

Future property can not be described in any more exact manner. The generality of its language forms no objection to the validity of the mortgage.

Counsel refer to Wilson vs. Boyce, 92 U. S. 320, as "inferentially in their favor." We cite that case also as *explicitly* in our favor. In that case it appeared a railroad company mortgaged "their road and property." This court say, 92 U. S. 325: "The generality of its
"language forms no objection to the validity of the mort-
"gage. A deed of *all my estate* is sufficient. So a deed
"of *all my lands wheresoever situated* is good to pass title.
"A *mortgage* of all my property like the one we are con-
"sidering is sufficient to transfer title."

See also Winslow vs. Mitchell, 2 Story 630.

Johnson vs. Dehancy, 4 Cow. 427.

Pond vs. Berg, 10 Page 130, 1 Atk. on Conv. 2.

III.

The objection that the execution of bonds and mortgage declared on was not authorized by the New Orleans, Baton Rouge and Vicksburg Railroad Company is without force.

The mortgage is a public act, an authentic act, and the bonds are made part of such act by being paraphed *ne varietur* to identify them therewith by the notary before whom the act was executed.

The authentic act is that which has been executed before a notary public in presence of two competent witnesses. Civil Code, Art. 2234. Such acts are closely assimilated to judicial proceedings. Succession of Tete, 7 A. La. 95. They make full proof of what is recited in them. *Strangers to such acts can not attack them except on an allegation of collusion to defraud them.* Davis Heirs vs. Prevost, 6 N. S. La. 268. Moreover, the bonds are countersigned by the secretary of the company, and the seal of the company is affixed to them.

The act of mortgage, the bonds and the coupons thereon were received in evidence without objection. They prove what they recite, and no evidence to the contrary appears in the record.

No objection was made in court *a qua* to the registry of the mortgage executed by the New Orleans, Baton Rouge, & Vicksburg Railroad Company. In anticipation of a possible objection here, it is perhaps necessary to state the law of Louisiana on that subject.

In Louisiana mortgages are generally perempted—*i. e.*, cease to have any effect after the expiration of ten years from registry unless prior to the expiration of ten years they have been reinscribed, and as a general rule mortgages have no effect as to third parties unless recorded in the parish where the immovable mortgaged is situated.

These general rules, however, do not apply to mortgages executed by a railroad company to secure the payment of any obligation contracted for the construction of the road. Such mortgage has full effect, by the record of the mortgage in the parish where the principal office or domicile of the road may be, *and such mortgage need not be reinscribed to continue it in force.* Revised Statues of Louisiana 1870, Sec. 727.

This has been the law of Louisiana for many years. Revised Statues 1856, p. 122, Sec. 44.

In addition to registry in the parish of Orleans, the domicile of the New Orleans, Baton Rouge & Vicksburg Railroad Company, the mortgage in question was registered, as shown by certificates offered in evidence, in following parishes, where a large proportion of the lands granted by Congress are situated, on following dates:

Natchitoches, October 12, 1870. Record, p. 24, Exhibit L.

Rapides, October 6, 1870. Record, p. 23, Exhibit K.

St. Landry, October 6, 1870. Record, p. 23.

De Soto, October 8, 1870. Record, p. 22.

Calcasieu, August 28, 1885. Record, p. 15.

Grant, September 1, 1885. Record, p. 24.

Sabine, August 27, 1885. Record, p. 23.

IV.

We have now reached, in what seems to us its logical order, the real, the essential question in this case, viz: What meaning and what effect shall be given to the words of the mortgage. Are the lands granted by Congress to the New Orleans, Baton Rouge & Vicksburg Railroad Company covered by the mortgage given by that company to secure payment of its first mortgage construction bonds?

The question as to what property is covered by a mort-

gage is purely one of construction, and depends entirely upon the language used and the obvious intention of the parties to be gathered therefrom and the authority under which it was issued.

3 Woods R. R. Law, Sec. 464, p. 1617.

In the interpretation of contracts the first and most important rule is to ascertain if possible the intention of the parties contracting. As was said by this court in Smith vs. McCullough, 104 U. S. 25: "The question must be "solved so as to give effect to the intention of the parties "to be collected, as well from the words of the instru- "ment as from the circumstances attending its execu- "tion."

Obviously in determining such a question very little assistance can be had from adjudged cases.

Each case must necessarily be determined by its own peculiar circumstances, but it must be borne in mind that under the laws of Louisiana in a *doubtful* case, the agreement is interpreted *against him who has contracted the obligation*. Civil Code, Art. 1957, as amended by Act No. 87 of General Assembly, session of 1871, page 201, Art. 1957, which declares: "In a doubtful case the agreement is interpreted against him who has contracted the obligation."

From the evidence in this cause it appears that some years since, some one conceived the magnificent scheme of constructing a railroad from New Orleans to Vicksburg, with branch lines to Baton Rouge and thence to Shreveport, and to such points on the Mississippi river as might be advisable, and to connect the main line with the railroads of other companies and with mines and manufactories in the State of Louisiana. All to be done with moneys to be obtained from the public.

In furtherance of this project "An act to incorporate the New Orleans, Baton Rouge & Vicksburg Railroad

Company" was introduced in the Legislature of Louisiana and became a law December 30, 1869. Acts La., 1870, p. 7.

By this act certain persons were constituted a body corporate under the name of The New Orleans, Baton Rouge and Vicksburg Railroad Company, and invested with power to construct and operate the main line and branches above mentioned. The capital stock was fixed at $1,000,000, and an organization was to be effected as soon as $500,000 of stock was subscribed and *5 per cent.* thereof, viz, $25,000, paid in.

Clearly the stockholders did not intend to furnish the means with which to build their road and branches. Where was the money to come from?

By this act the State of Louisiana gave to said company the right of way through all lands owned by the State and authorized it to issue its *second* mortgage bonds to the amount of $12,500 for each and every mile in length of the main line of its road and branches within the State, bearing interest at a rate not exceeding 8 per cent., to be secured by a mortgage on all the property owned by the company at the date of the mortgage or which might thereafter be acquired, the payment of the principal and interest of such bonds being by said act guaranteed by the State.

The company was also authorized to issue bonds to a like amount, to be known as *first* mortgage construction bonds, to be secured by a *first* mortgage on all property owned by the company or which might thereafter be acquired and on its franchises. And it was further authorized to obtain rights, privileges and franchises from the parishes, towns and cities of the State. Not contented with these munificent franchises, the company applied to Congress for aid and obtained it. Congress granted the right of way through the public lands, and, *in aid of the*

construction of a road from New Orleans to Baton Rouge, thence by way of Alexandria to connect with the Texas & Pacific Railway at Shreveport, granted something over 1,000,000 acres of land. See Act to incorporate the Texas & Pacific Railway, etc., approved March 3, 1871, Sec. 22.

The company thus rich in franchises had no money, and proposed to get moneys by floating its bonds in the United States and Europe. It issued 6250 "first mortgage construction bonds," each for the sum of $1000, payable at forty years in gold coin in New York, or £200 in London, at the option of the holder, bearing 8 per cent. interest, payable semi-annually, with coupons attached.

These bonds on their face recite that the payment of the principal and interest "is secured by a first mortgage on all "the real and personal estate of the company within the "State of Louisiana, owned by the company at the date "of the mortgage or which may be acquired by it there-"after, and on all the corporate franchises and privileges "of said company granted by the State of Louisiana or "by act of Congress relative to the *construction*, opera-"tion and use of its main line and branches."

These bonds bear date October 1, 1870, and the act of Congress by which lands were granted to the company *to aid in the construction* of its branch line from Baton Rouge to Shreveport became a law on the 3d March, 1871, by the approval of the President, but it is public history that the act incorporating the Texas & Pacific Railway Company, by which the grant was made to the New Orleans, Baton Rouge & Vicksburg Railroad Company was, for a long time, pending in Congress, and though it was not a law on October 1, 1870, the New Orleans, Baton Rouge & Vicksburg Railroad Company unquestionably expected with good reason that it would soon thereafter become a law.

It is apparent that the recitals in the bond with reference to the acts of Congress were intended to convey the idea that investors in the bonds would be secured by a mortgage on any thing granted by Congress in aid of the construction of the road.

It is also recited in the bonds that second mortgage bonds of the company to the amount of $6,250,000 are guaranteed by the State of Louisiana.

From these facts and circumstances it is impossible to avoid the conclusion that when the incorporators applied for a charter, and when the Legislature granted a charter to the N. O., B. R. & V. R. R. Co., both the incorporators and the Legislature expected the road and branches to be constructed with moneys derived *exclusively* from the sale of the bonds of the company; that the incorporators desired and intended the Legislature should invest the company with power to mortgage its *franchises* and *all its future property*, without exception; that the Legislature intended to invest the company with such power, and, in fine, that the main object of both the corporators and the Legislature was to make the bonds of the company attractive to capitalists.

Here was a great public enterprise, a vast railroad system to be constructed with moneys exclusively advanced on the faith of bonds and mortgages

It was only simple justice that the bond holders who furnished the money to construct the road should have for security all the property which the company might acquire, and it was simply natural that the corporators and Legislature should add to the value of the bonds by securing their payment by all possible means. From the standpoint of the corporators and the Legislature, it would have been a blunder had the Legislature failed to authorize the company to mortgage its franchise and all of its property of every kind *present* and *future*.

No such blunder was committed.

There is no difficulty in arriving at the true meaning of the words used in the mortgage, when viewed in the strong light thrown around them by the facts and circumstances connected with and attendant on the execution of the mortgage.

It is set forth in act of mortgage that the company mortgages the whole of the main line, and all branch lines, together with the right of way, road bed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, tenders and other rolling stock; also all real and personal estate owned by said company or which may be acquired thereafter, appurtenant to or necessary for the operation of its main line or any branch line.

"Also *all other* property real and personal of every "kind and description whatsoever, and *wheresoever* situated, "in the State of Louisiana, now owned or which shall be "hereafter acquired by said company, and which shall "be appurtenant to, or necessary, or used for the operation of said main line or any of said branches."

"Also the tenements and hereditaments and appur-"tenances thereunto belonging, and all of the estate, "right, title and interest, legal and equitable, of the said "company and its successors and assigns therein, to-"gether with the *corporate franchises* and privileges of "said company granted or to be granted," etc.

By these words the company intended to mortgage and did mortgage *all* of its property within the State of Louisiana of every nature and description whatsoever and *wherever* situated, then owned, or which might thereafter be acquired, together with all of its franchises, rights and privileges.

A multitude of words were used *ex industria* to convey that intention simply because the draughtsman who framed the act of the Legislature incorporating the company was not skilled in the use of words.

It is contended by my opponents that the true reading of the mortgage is "all property, etc., appurtenant to or "necessary or used for the operation of the line," *i. e.*, all property appurtenant to the *operation* of the line. Such reading is not sustained by any rule of grammatical construction or by any other rule.

A thing may be necessary for the operation of a line, or it may be used for the operation of a line without being necessary, but a thing can not be appurtenant to the *operation* of a line. A line of railroad can not be operated without a great many things, but such things are not appurtenant to the operation of the line. *They are appurtenant to the line.*

Things which are necessary for the operation of a line, or used for the operation of the line, are of course appurtenant to such line but other things may be and usually are appurtenant to the line which are neither necessary for or used in its operation.

The words used in mortgage should be punctuated as follows: all property, etc., appurtenant to, or necessary or used for the operation of, the line. That is to say all property appurtenant to the line.

In the paragraph first stating property mortgaged, the words used are, "appurtenant to, or necessary for the operation of the line." This paragraph includes the main line, all branches, right of way, road bed, depots, stations, shops, buildings, machinery, tools, engines, cars, tenders and other rolling stock, also all real and personal property.

In the next paragraph the words are "all *other* property, "real and personal, of every kind and description what-"ever, and *wheresoever situated*, now owned or which "shall be hereafter acquired and which shall be appurte-"nant to, or necessary or used for the operation of, the "line, or any of said branches."

The word "necessary" in that sentence clearly relates

to "for the operation of the line." Necessary for what? For the operation of the line. "Necessary" must be connected with line in some way, and can not be so connected in any other way.

When analyzed, the sentence reads: All property, etc., appurtenant to the main line or any branch line, all property, etc., necessary for the operation of the line, etc., and all property, etc., used for the operation of the line, etc.

The words used in mortgage were of course intended to mean something. In construing a contract some meaning must be given, when it can properly be done, to all words found therein.

The words "necessary for the operations of the line" convey a clear idea. So do the words "or used for the operation of the line." These two ideas are distinct, one from the other. Evidently, it was the intention to mortgage everything necessarily used in operating the line and everything which, though not necessary for the operation of the line, was nevertheless used in its operation.

What then were the words "appurtenant to" used for? Undoubtedly to express some idea, to convey some meaning. Yet if they be construed as relating to the *operation* of the line, they are absolutely without meaning. The words "necessary or used for the operation of the line" include property appurtenant to the operation of the line, since nothing can be appurtenant to the operation of the line which is not used for the operation of the line either necessarily or unnecessarily. It seems absurd to say that the words "appurtenant to" as used in mortgage were intended to convey exactly the same ideas intended to be conveyed by the words "necessary or used for the operation of the line."

The mortgagor intended to mortgage all property nec-

essarily used for the operation of the line, all property which though not necessary was nevertheless used for the operation of the line, and all property appurtenant to the line, or any of its branches. That is to say all property of every kind then belonging to or which might thereafter be acquired by the company, together with its corporate franchises, rights and privileges. That is to say the mortgagor intended to mortgage the whole thing, with all its franchises, rights and privileges.

It is stipulated in mortgage that the company mortgages all real estate of every kind and description *whatsoever* and *wheresoever situated*. Real estate situated at a distance from the line is not, and in the nature of things can not be, necessary for, or used for the operation of the line, but real estate, *wheresoever* situated, may be and frequently is appurtenant to the line. To illustrate: Locomotives and cars are necessary for the operation of a railroad line; a luxurious palace car, though not necessary, may be used by the officers of the line in operating it, and lands granted by Congress in aid of the construction of a line, while they can not be used necessarily or otherwise in the operation of the line, are, nevertheless, appurtenant to the line.

In this case the lands granted by Congress were granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company, to aid it in the construction of its branch line from Baton Rouge by way of Alexandria to Shreveport. Such lands were appurtenant to such branch line—they belonged to it—and it would have been a fraud on the part of the company if the lands or the proceeds thereof had been appropriated to any other purpose than the construction of such branch line.

"The words of a law—and of a contract—are gener-
" ally to be understood in their most usual signification,
" without attending so much to the niceties of grammat-

" ical rules as to the general and popular use of the " words."

Civil Code La., Art. 14.

This rule is common to all systems of jurisprudence. The word Appurtenant is thus defined: Webster—Belonging to; Latin, *appertinere*; from *ad*—to—and *pertinere*—to belong to, to pertain to. Bouvier—Belonging to, pertaining to. These definitions undoubtedly give " the usual signification" of the word—the sense in which it is generally and popularly used.

When Appurtenant was used by the Legislature of Louisiana in act of incorporation, and when that word was used in the mortgage, it was used in its usual general and popular signification. In the civil law that word has no technical meaning. It may have in the common law, but the Legislature of Louisiana and the mortgagors, citizens of Louisiana, authorizing and executing a mortgage in Louisiana to have effect only in Louisiana, did not use the word Appurtenant in any sense in which it may be technical in the common law—they used it to express its *general signification* in the "popular use" of the word. By the use of the words "appurtenant to the line" they meant to convey, and did convey, the idea that all property, real and personal, of whatever description and wheresoever situated, belonging to or pertaining to the line was to be subject to the mortgage given to secure the payment of the bonds.

Bouvier, after giving the technical meaning of appurtenant in the common law, says; "The thing appur- " tenant must be of an inferior nature to the thing to " which it is appurtenant; thus a right of common ' may be appurtenant, as when it is annexed to lands " in other lordships." Even in this sense the lands granted to aid in the construction of a railroad are appurtenant thereto, the road being the principal thing to which such lands pertain, to which they belong.

In this connection we call attention to the fact that in ordinary parlance, the words "the road, the line" are used as synonymous with "the company;" *e. g.*, such a thing belongs to the road, such a thing is owned by the line. These words are frequently so used in decisions by the courts. In Pierce vs. Emery, 32 N. H. 484, the court say that after a careful review of the question "We are of opinion the act authorized the "company to mortgage the whole road as a whole thing "with all the corporate rights and franchises, and in- "cidentally by way of accession, all the subsequently "acquired property of the road."

The court say further, the deed conveys lands subsequently acquired, and taking the whole deed together the intention is apparent to mortgage not only the property then belonging to the road, but the road itself and all its franchises, as one entire thing, and as an incident and accession, all property of the corporation afterward acquired.

In this decision corporation and road are used as synonymous. It is to be observed also that this case is strong in our favor as to all the propositions herein maintained. See also U. S. Trust Co. vs. W., St. L. & P. R. R. Co., 32 F. R. 480.

The real difference between the opposing parties in case at bar is this. We say the mortgage in question expressly embraces all property of every kind and description whatsover and wheresoever situated, then owned, or which might be acquired by the New Orleans, Baton Rouge & Vicksburg Railroad Company, appurtenant to its main line or any of its branches, and we say further that such mortgage was a mortgage of the whole road as a whole thing, with all its corporate franchises and rights, carrying with them all subsequently acquired property.

Our adversaries say the mortgage covers so far as

after acquired property is concerned only such as is appurtenant to the *operation* of the line. This idea is always in the mind of our learned opponents. They persistently express it. Nearly all of the cases cited by them in their brief filed in court *a qua* show simply that property not connected with the *operation* of a road is not embraced within the terms of a mortgage granted on property *used* for *operating* a road. This and nothing more was decided in following cases cited in said brief.

Welsh vs. Barton, 24 Ohio Stat. 28: There the mortgage was given on a railroad and all after acquired property *used* or appropriated for *the operation* of the road. Held, such mortgage does not include after acquired property not used or appropriated for *operating* the road.

Farmers' Loan and Trust Co. vs. Commercial Bank, 11 Wi. 207. Same case 15 Wis. 424: There the mortgage covered every kind of property "which shall be used for operating said railroad." Held, not to include after acquired property not used in the construction or operation of the road.

Seymour vs. C. & N. F. R. R. Co., 25 Barb. 284: Held, that a mortgage of "real estate thereafter to be occupied for the railway" did not include lands subsequently acquired, but not used for railroad purposes. Dinsmore vs. R. & M. R. R. Co., 12 Wis. 649: There the R. & M. R. R. Co. mortgaged its road and superstructure, track and all appurtenances made or to be made to same, the land on which the road had been or should be constructed, including depots, shops, engine houses, and other constructions at the termini and along the line of the road, and the land on which same were erected and that which should be used for depot and station purposes. Held, such mortgage did not cover a large tract of woodland seven miles from the road. Farmers' Loan and Trust Co. vs. Cary, 13 Wis. 119: Held, a mortgage on

"every other kind of personal property which shall be used for *operating* a railroad does not include personal property *not* used in constructing or operating the road."

These decisions are sound, but decide nothing applicable to case at bar.

Counsel assert that a mortgage of a main line of railroad with its appurtenances does not cover lands lying beyond the terminus of the main line, and cite Buck vs. Memphis, 4 Central Law Journal 430. That case simply holds that a deed of trust on the main line of an Arkansas railroad, covering rolling stock appurtenances and income, does not cover real estate having an actual *situs* in Tennessee. That such real estate is subject to attachment in Tennessee, though cars or moneys the earnings of the road found in Tennessee are not suject to attachment because such cars and moneys were vested in the trustees. The decision being that personal property follows the law of domicile, while real estate falls under *lex rei sitæ*.

Counsel assert that a mortgage of property belonging or appertaining to a railroad does not cover steamboats purchased to withdraw them from opposition business, and cite Morgan vs. Donovan, 58 Ala. 241. Such citing is another error on the part of learned counsel. In that case it appears a railroad corporation executed deeds of trust of the lands occupied by said railroad, all depots, station houses, wharves, etc., used in connection with the road, together with all steamboats and personal property *used exclusively* for constructing, maintaining, operating or conducting the business of said railroad. Held, that property bought of an opposition steamship line not with a view of employing it in connection with the business of the road, but to withdraw it from business, thereby preventing competition, was not conveyed by the granted claims in said deeds of trust, and that such purchase was

not authorized by the charter of the corporation. Counsel citing Parish vs. Wheeler, 22 N. Y, 494, say a mortgage of property belonging or appertaining to a railroad does not cover canal boats owned and used by a railroad company beyond the terminus of its road. The case cited does not sustain this assertion. The question whether or not the canal boats were covered by the mortgage was not passed on. Comstock, Ch. J., said: "The inclination of my mind is that the canal boats were not included in the description of the mortgage," but the decision was based entirely on other grounds, and the court said the canal boats would pass under a general clause embracing all other personal property whatsoever in any way appertaining to the railroad.

The case Smith vs. McCullough, 104 U. S. 25, is said by counsel for defence to be distinctly in their favor. It is difficult to see how they arrived at such conclusion. In that case the court say, the question whether or not certain property is embraced by a mortgage "is within a very narrow compass; it must be "solved so as to give effect to the intention of the par- "ties to be collected as well from the words of the "instrument as from the circumstances attending its "execution."

The mortgage in question in that case was as follows: All the present and in future to be acquired property of or in any manner pertaining to the Linneus branch of the Burlington & Southwestern Railway Company, *that is to say*, all the branch railroad, now made and to be constructed, including right of way, road bed, superstructure, iron ties, chains, splices, bolts, nuts, spikes, and all the land and depot grounds, station houses, depots, viaducts, bridges, timber and materials, and property purchased or to be purchased or otherwise acquired for the construction and maintenance of said branch railroad, and all kind

of rolling stock now owned or hereafter purchased for and on account of said branch road, etc.

It seems clear that by the words "*that is to say*" the mortgage is limited to property embraced in the words which follow, and the Supreme Court therefore held that certain bonds of a county were not included in those words. In the mortgage given by the N. O., B. R. & V. R. Co. there is no "that is to say," nor is there any clause limiting the general mortgage on "all other prop-"erty, real or personal, of every kind and description "whatever and *wheresoever situated*, now owned or which "shall be hereafter acquired by said company" appurtenant to the main line or any branch. This general clause follows after the clauses in which certain property is specially and minutely set forth, and it was unquestionably intended to grant a mortgage on property, "other" than that previously mentioned.

The case of Wilson vs. Boyce, 92 U. S. 320, is said by counsel for defendant below to be "inferentially" in their favor. It is not in their favor, either inferentially or otherwise. The case is not correctly stated in brief. It appears from the decision that the State of Missouri issued bonds to the Cairo & Fulton Railroad Company, which were by statute a mortgage on the road and every part and section thereof and its appurtenances. By a subsequent statute bonds issued to the company were declared to constitute a mortgage on the road and the property of the company.

The court said "it is not necessary to decide whether the land in question would pass under the expression 'appurtenancies' and held that the words 'and property of the company' included all the lands of the company, among which were the lands in question, granted by Congress to the company and not used in operating the road. This decision was correct, but it does not aid our oppo-

nents in any manner. It is not as they contend 'replete' with inferences in their favor."

The case Tucker vs. Ferguson, 22 Wall, 527, which counsel cite and which they say is "quite a point in their favor," is also misstated by them. The decision of this court is not such as is stated and it does not bear upon case at bar. In the Tucker case a certain statute of Wisconsin was incidentally alluded to. That statute was a general railroad act, and by its 20th section levied "as a specific annual tax one per cent. upon the *cost* of the road and its equipments and appurtenances of every kind."

The seventh section of the same act provided that lands granted to a railroad company should not be liable to taxation for seven years subsequent to date of the statute. It is perfectly clear that when the Legislature exempts certain lands granted to a railroad company from taxation for seven years and in the same statute levies a specific annual tax of 1 per cent. upon the *cost* of the road and its equipments and appurtenances, the levying of such specific annual tax can not properly be construed to mean that the lands were to be exempt from taxation without limit of time, and this court so held. Counsel say that in case Tennessee vs. Whitworth, 117 U. S., p. 138, this court "liken appurtenances of a railroad to the equipments es-" sential for its use." The decision contains nothing authorizing that assertion. The sole question at issue in that case was whether the capital stock of the N., C. & St. L. R. R. Co. was subject to taxation. The court held that by the charter granted to said company its capital stock (shares) was exempted from taxation. The case Boston, etc., vs. Coffin, 12 Am. & Eng. R. R. Cases 375, is not, as asserted by counsel, conclusive in their favor. In that case the court based their decision upon their construction of the act of mortgage, and say:

"We think the *context* shows that the phrases mortgag-

" ing lands were subject to qualifications and were con-
" fined in their application to what was necessary and
" convenient for the construction of the road—the phrase,
" all property of said company under its charter, is found
" intimately connected and *in same sentence* with, and
" everything necessary for the completion and operation
" of the road. It would be strange if the *former* should
" be more comprehensive than the *latter*, when the latter
" is a sweeping clause evidently used by the draughts-
" man to include everything intended to be conveyed,
" which possibly the previous language might not in-
" clude."

This method of reasoning if applied to case at bar must result in the conclusion at which we have arrived. In the mortgage executed by the N. O., B. R. & V. R. R. the context does not show that the phrases mortgaging lands were subject to qualification, and confined to what was necessary for the construction and operation of the road.

The phrase in mortgage given by the N. O., B. R. & V. R. R. Co.: " Also all *other* property, real or personal, " of every kind and description whatsoever and where-
" soever situated," is not found in *same sentence* with or followed by any latter phrase used by the draughtsman as a sweeping clause to include everything intended to be conveyed, which, possibly, the previous language might not include.

On the contrary, the paragraph on mortgage in case at bar, which we quote, is an independent paragraph, and is itself the sweeping clause used by the draughtsman to include everything intended to be conveyed, which possibly the previous language might not include.

It is the last paragraph in the mortgage in which the property mortgaged is described. The draughtsman had previously used words which unquestionably covered all

property appurtenant to, or necessary for the *operation* of, the road, and then by a latter clause he included in the mortgage "*all other* property, real and personal." It would seem absurd to say that the words "other property" mean property included in a previous paragraph. "To make assurance doubly sure" the draughtsman adds to the words "all other property" the following: "Of every kind and description whatsoever and wheresoever situated." As has been shown, real property necessary or used for the *operation* of a road can not be "wheresoever situated." It must be at least contiguous to the road, and susceptible of being used in some way for the purposes of operating the road.

Nothing in the decision in Boston vs. Coffin authorizes the belief that the Supreme Court of Connecticut would decide case at bar against appellees.

In the Boston case the court held that the railroad company had no power to hold lands not required for the purposes of a railroad. The New Orleans, Baton Rouge & Vicksburg Railroad Company was invested with such power. Moreover, in the Boston case the court held that lands acquired for either the construction or operation of the road would be "lands acquired for the purposes of the road. In case at bar the lands granted by Congress were granted to enable the company to construct its branch road and were to be appropriated to that purpose.

In this connection we desire to discuss the following proposition announced by the learned counsel of appellants. They say "No lands had at the date of the mort-"gage been granted to the mortgagor, nor was the "mortgagor even authorized to accept and deal with a "land grant," and they assert that even though the mortgage embraced future property it did not cover lands granted by Congress—Meyer vs. Johnson, 53 Ala., is cited

to sustain this proposition. The case at bar is not correctly stated by learned counsel, and the case cited is not in point. It was held in Meyer vs. Johnson that the authority of a railroad company to bind its future acquisitions by mortgage is limited to such acquisitions as it then has the power by charter or by general law to make. Applying that principle the court found that lands granted to the A. & T. R. R. Co. by the United States subsequent to a mortgage of its present and future property were not covered by such mortgage *because*, under the *law of Alabama*, the company had no power to accept such a grant when the mortgage was given, and *because* the acquisition *of such a land grant was not then contemplated.*

Conceding merely for the sake of the argument that this decision is sound, it is not applicable to case at bar, because the acquisition of the land grant from Congress was contemplated by the New Orleans, Baton Rouge & Vicksburg Railroad Company at time its mortgage was executed and bonds thereby secured issued, and because that company had at the date of such mortgage full power to accept and hold such grant.

The common law annexes to a corporation when created certain incidents and powers, which, without any express provision, are deemed to be inseparable from every corporation. Among others the power to purchase and hold lands. Boone Corporations, Sec. 37.

A railway company may acquire real estate by consent or grant of the owner and hold same for purpose of aiding in the construction, maintenance and accommodation of its railway. It is presumed that lands deeded to such company are required for the construction of its road. Ibid., Sec. 246.

These provisions of the law have been by statute adopted and embodied in the law of Louisiana. R. S. of 1870, Sec. 684: "Said corporations shall have power to

"hold, receive, purchase and convey under their corpo-
"rate name property both real and personal."

Corporations may possess an estate; they are capable of receiving legacies and donations; they may obligate others and obligate themselves to others, etc. Civil Code, Art. 433.

Counsel are mistaken when they say the New Orleans, Baton Rouge & Vicksburg Railroad Company was not even authorized to accept and deal with a land grant. The fact is otherwise; that company had full power to accept the grant, and such being the case, the point raised by counsel falls. *En passant*, the attention of the court is directed to the fact that the appellants claim title to the lands granted by Congress to the New Orleans, Baton Rouge & Vicksburg Railroad Company under an assignment and transfer from that company.

Appellants can not, therefore, in a court of equity or in any court be permitted to say that the New Orleans, Baton Rouge & Vicksburg Railroad Company had no title to, and therefore could not mortgage the lands granted by Congress.

It is scarcely necessary to pursue this subject further, but if your honors care to examine the authorities, you will find that even when a corporation is not authorized to acquire, it may nevertheless convey a good title and make a valid mortgage.

1 Wood Railway Law, p. 563, note 4.

Natoma Water Co. vs. Clarkson, 14 Cal. 544.

Spear vs. Crawford, 14 Wendell N. Y. 20.

Moreover, the question whether a corporation has power to hold property to which it has the apparent legal title can be raised only by the government.

Leazure vs. Hillegas, 7 S. & R. Penn. 313.

Baird vs. Bank, 11 S. & R. Penn.

Gaunder vs. Northampton Water Co., 7 Penn. St. 233.

Natoma Co. vs. Clarkson, 14 Cal. 544.

We have now considered every case cited by counsel for appellants in their brief filed in court *a qua* except three, which we have been unable to find, viz: Calhoun vs. Memphis; Miss. Valley Co. vs. Chicago; Mobile R. R. Co. vs. Mosely.

With regard to Calhoun vs. Memphis, the Supreme Court of Louisiana say in case Bell vs. R. R. Co., hereinbefore cited, that it can not be permitted to avail anything against the high authority of the many cases cited by them.

It appears from the brief referred to, that in Mobile vs. Mosely, certain lands granted to a railroad company were held to be not exempt from taxation although all the property of the company necessary to and used in the business of the company was exempt from taxation. It is difficult to see how this decision bears on case at bar.

A careful study of all the authorities (which I have been able to find) bearing on this case confirms the opinion that the essential question in this case is one purely of interpretation and construction. It depends upon the language used and the intention of the parties, which must be gathered from the act of mortgage and the circumstances attending its execution.

The language used in the mortgage under consideration and the circumstances attending its execution show conclusively that the New Orleans, Baton Rouge & Vicksburg Railroad Company intended to mortgage and did mortgage all its real estate then owned or which might thereafter be acquired of every kind and description *whatsoever and wheresoever situated.* The mortgage, then, by its terms, covers the lands granted by Congress to that company "in aid of the construction of the road." Moreover, it is clear that said company by said mortgage mortgaged its road and all branches as a whole thing, together with all its corporate franchises and privi-

leges. If so, future acquired property became subject to the mortgage as an accession to the thing mortgaged.

Under the general law of Louisiana, and under the charter granted to the N. O., B. R. & V. R. R. Co. that company was expressly authorized to mortgage its property, and also its corporate franchises, and it did mortgage all its property and also its corporate franchises. Such a mortgage is a mortgage of the corporation as an entirety. It includes all property owned by the corporation and all property subsequently acquired.

In Rorer on Railroads, a work recently published, page 245, the principle is thus stated: "A mortgage by a railroad company, of all their road property, rights, liberties, privileges, corporate franchises, incomes, tolls and receipts, under and in accordance with a statute authorizing such company to borrow money to construct and equip their road and to issue bonds therefor and to execute a mortgage to secure same on all or any part of their road property, rights, liberties or franchises, is not only valid and good in law, as to all the then existing interests of the company owned by them at the time of making the mortgage, within the description of property and interest therein described, but is also binding and effectual in law, in like manner as to all such property and interest thereafter acquired from time to time by said company.

In support of this proposition Rorer refers to some eighteen or twenty decisions. When a railroad company is authorized to mortgage its franchises, as the N. O., B. R. & V. R. R. Co. was by special charter and by the general law of Louisiana, after acquired property passed (as incident to the franchises to acquire property) by a mortgage of the franchises and property of the company. Such a mortgage is regarded as a conveyance of the property and franchises of the company as an entire thing.

Jones R. R. Securities, Sec. 127; *Pierce vs. Emery*, 32 N. H. 484; Philipps vs. Winslow, 18 B., Mon. Ky. 431; Wilink vs. Monroe Canal, 3 Green N. J. Ch. 377.

Under this principle it was held in Coe vs. Del., Lack. & W. R. R. Co., Am. and Eng. R. R. cases, 4th, vol. 14, that a mortgage given by a railroad company on its franchises, and roads to be thereafter built, covers a branch road *not in contemplation* at date of mortgage. Mase vs. Nicholes, 17 A. & E. 230.

Let us suppose that after the lands had been granted to the N. O., B. R. & V. R. R. Co., it had sold. "The "whole of its main line and all of its branch lines, to- "gether with the right of way, road bed, rails, depots, "stations, shops, buildings, machinery, tools, engines, "cars, tenders, and all other rolling stock; also all real "and personal estate owned by the company, appurtenant "to, or necessary for the operation of, its main line or "any branch line.

"Also all other property real and personal, of every "kind and description whatsoever, and wheresoever sit- "uated, now owned by said company, which is appur- "tenant to, or necessary or used for the operation of, "said main line or any branch, *together with the corpo- "rate franchises and privileges of said company*."

Is it not clear that by such a sale the New Orleans, Baton Rouge & Vicksburg Railroad Company would have conveyed all its property and all its franchises *as a whole*, and that the vendee acquired *all* lands belonging to the company at the date of sale, including, of course, any lands granted by Congress? If these propositions be true, and we do not see how they can be doubted, it follows that the same words, which in the one instance import a sale of certain lands, when used in an act of sale, must import a mortgage on those lands, when used in an act of mortgage. Williamette vs. Bank British Columbia, 119 U. S. 191.

V.

It is claimed by appellants that the New Orleans, Baton Rouge & Vicksburg Railroad Company never (as counsel express it) earned an acre of the land granted by Congress. That the road was really built by the New Orleans Pacific Railway Company, and that the latter company consequently has equities superior to those asserted by appellees. As a matter of fact a portion of the road from New Orleans to Baton Rouge, some sixty miles, was constructed and operated before the New Orleans Pacific Railway Company was organized. But it is immaterial whether or not the New Orleans, Baton Rouge and Vicksburg Railroad Company constructed a road or any portion thereof.

It is also claimed that the lands in controversy were patented to the N. O. P. R. Co. This claim is unfounded. The lands were patented to the N. O. P. R. Co. as *assignees* of the N. O., B. R. & V. R. R. Co.

The Act of Congress of March 3, 1871, granting those lands to the N. O., B. R. & V. R. R. Co. was a *present* grant vesting title in that company. The words of the act are: "There is hereby granted to the said company" alternate sections, etc.

In Mo. Ry. Co. vs. K. P. Ry. Co., 97 U. S. 496, the court say: "Those words import a grant *in præsenti* "and not one *in futuro*. It is true the route is to be after- "ward designated, and until designated, title could not "attach to any specific lands. When the route is estab- "lished, the location became certain, and the title pre- "viously imperfect acquires precision, and attached to "the land." See also Schulenberg vs. Harriman, 21 Wall. 60; L., L. & G. R. R. Co. vs. U. S., 92 U. S. 733.

On November 11, 1871, the N. O., B. R. & V. R. R. Co. filed in the General Land Office a map designating the route of its road from Baton Rouge, by way of Alex-

andria, to Shreveport, thereby making "the location certain, and the title acquired precision and attached to the lands" granted by Congress. Thereupon said lands were withdrawn from further entry. See map record 14, 15, and action of Department of Interior, record 15, 16, 17.

The title and ownership of the New Orleans, Baton Rouge & Vicksburg Railroad Company became perfect and the lands granted by Congress having thus been precisely designated became a part of and belonged to the whole known as the New Orleans, Baton Rouge and Vicksburg Railroad Company, with all its property and corporate rights and franchises.

Such title and ownership so vested in the New Orleans, Baton Rouge & Vicksburg Railroad Company *can not be disputed* by the New Orleans Pacific Railway Company or by those holding under it, because the New Orleans Pacific Railway Company claims under a transfer from the New Orleans, Baton Rouge and Vicksburg Railroad Company.

But it is clear that on the 11th of November, 1871, title to lands in controversy vested in the New Orleans, Baton Rouge & Vicksburg Railroad Company, and that said lands being acquired by said company fell under the mortgage given by it to secure payment of its bonds. That mortgage was immediately after its execution recorded in the parish of Orleans, the domicile of the company, and has been duly registered in the parishes where the land lies. The transfer from the New Orleans, Baton Rouge & Vicksburg Railroad Company to the New Orleans Pacific Railway Company, and any mortgage executed by latter company, were made with notice and knowledge of the mortgage originally executed by the New Orleans, Baton Rouge & Vicksburg Railroad Company.

The rights of the mortgagees were vested and can not

be affected by any equities subsequently arising. "It is a settled legal principle that a fixed legal right under a mortgage can not be impaired by any equities subsequently arising." Jones R. R. Sec. 557. The order of priority of two or more railway mortgages is not affected by the fact that a part of the road was wholly built by money raised by means of the junior mortgage. The rule *qui prior est tempore, potior est jure* governs as to the priority of mortgages. Jones R. R. Securities, Sec. 564.

Toledo, Delphos & Burlington R. R. Co. vs. Hamilton, 134 U. S. 296.

Thompson vs. W. W. V. R. R. Co., 132 U. S. 68.

VI.

The Act of Congress of February 8, 1887. To declare a forfeiture of land granted to the N. O., B. R. & V. R. R. Co., etc., was referred to in court *a qua* by counsel for appellants, as showing that the lands in controversy were earned by the N. O. P. R. Co. That act does not so show, and if it did, it would not avail anything, for reasons hereinbefore stated. The lands in controversy were not forfeited by that act; on the contrary, it confirms the title of the N. O. P. R. to those lands as *assignee* of the N. O., B. R. & V. R. R. Co.

The act of Congress does not in any manner assume to affect any rights of appellants as holders of bonds secured by mortgage on said lands, and if it did so assume could not affect their vested rights.

If title vested in the N. O., B. R. & V. R. R. Co. to the lands in controversy, under a grant from Congress, and if those lands were mortgaged by said company to secure its bonds, the vested rights of third persons, innocent holders of such bonds, can not be either destroyed or impaired by subsequent legislation.

VII.

With regard to errors assigned in this court:

The *first* requires no further argument than that hereinbefore made.

The *second* and the *third* are discussed in our brief on motion to dismiss, to which we respectfully refer.

The fourth, fifth, sixth, seventh, ninth and tenth have been hereinbefore discussed.

The eighth, viz: that the claims of complainant are barred by the laches set up in answer, does not merit serious consideration. It is alleged in answer that complainant never set up any claim under said mortgage or notified the N. O. P. Ry. Co. or its trustees of any claim thereunder. In reply to this, it is sufficient to say that the mortgage in question was duly recorded, and by its registry gave notice to the N. O. P. Ry. Co., to said trustees and to all the world, of the claims existing thereunder.

Nor is it true that complainant slept on his rights for fifteen years. His bill was filed on 11th February, 1886; the matured coupons attached to bonds held by him, matured semi annually from 1st April, 1871, continuously up to date of such filing. The bonds are not due until 1910. Complainant is not barred by statute of limitations, and there has been no unreasonable delay in the assertion of his rights. The books will be searched in vain for any authority sustaining this charge of laches.

The decree appealed from should be affirmed.

Respectfully submitted, A. H. Garland

A. H. LEONARD,

Of Counsel for Appellee, John D. Parker.

The mortgage still lives if even the debt secured by it is barred and recovery can be had on that.

2 Hild. Mort. p. 27, Sec. 64 (2 ed.). Lewis v Hawkins 23 Wall. 119, and cases referred to in brief in that case on p. 123. — See especially Cross v Allen, 141 U.S., 537.

FILED.
JAN 4 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 137.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY ET AL.

versus

JOHN D. PARKER ET ALS.

REPLY TO BRIEF OF PARKER, APPELLEE.

W. W. HOWE,
JOHN F. DILLON.
WAGER SWAYNE,
For Appellants.

DECEMBER, 1891.

THOMASON PRINT 33 NATCHEZ ST. N. O.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 137.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY ET AL.

versus

JOHN D. PARKER ET ALS.

REPLY TO BRIEF OF PARKER, APPELLEE.

In reply to the brief filed December 12th, 1891, by counsel for John D. Parker, we beg to say, that the brief in question, like the opinion of the lower Judge, fail to state with accuracy the positions taken by the appellants. We shall sum them up at the close of this paper. Meantime let it be noted:

I.

The Act No. 143 of 1869, being the charter of the New Orleans, Baton Rouge and Vicksburg Railroad Company, printed at p. 7 of Acts of 1870, does not grant any power to mortgage future property, *except* what may be appurtenant to or necessary for the operation of the road. The counsel for Parker are therefore in error in their statements, with respect to this charter, at p. 3 of their brief.

The quotation from Domat at p. 4 cannot benefit the appellees. It was this very doctrine of such writers as Domat that the Code

of Louisiana modified when it declared that "future property can *never* be the the subject of a conventional mortgage." See appendix to our original brief, p. 80.

The situation in October, 1870, then, was this: The New Orleans, Baton Rouge and Vicksburg Railroad Company had no power under the general law or Codes of Louisiana to mortgage any future property except a railroad and its appurtenances, and the special power it had under its charter was to mortgage only such after-acquired property as might be appurtenant to or necessary for the operation of its roads, and, of course, actually acquired.

The case of Bell vs. R. R. Co., 34 La. An. 789, has been correctly interpreted by Judge Pardee in his opinion quoted in our original brief, and has been misunderstood by our opponents as well as by the lower Judge in this cause. In that case a railroad had mortgaged property thereafter to be acquired, and the property in question in the cause was a part of the organism of the railroad, "appurtenant to and necessary for its operation," an office, etc.

The whole point of the case is found at p. 790 and p. 795 of the Reports. At p. 790 the Court says:

"The railroad with its accessories and appurtenances is generally disposed of *in globo* for it forms an *entirety*, an *organism*, which should not be dismembered or parcelled out."

And at p. 795, it is said of the property in dispute (a railroad office, etc):

"The two parcels of real estate described in the petition, *and which are indispensable accessories and adjuncts*, became affected with such mortgage from the time of their acquisition by said Company."

It further appeared, p. 795, that these two pieces of real estate appurtenant to the organism, accessory and adjunct, were in cus-

tody of the United States Circuit Court at the time the judicial mortgage was recorded, and so Bell's lien did not attach at all.

So that we were right in saying, that although there is much disquisition and, we may add, *dictum*, in the decision, it is in support of our views in the case at bar, and was so considered by Judge Pardee, who was, of course, familiar with the case historically.

II.

The point we made as to there being no description of a land grant or its granted lands, in the mortgage of 1870, has been strangely misapprehended by our opponents.

We cited the Article of the Code of 1870, which declares:

"Art. 3305 (3272). To render a conventional mortgage valid it is necessary that the act establishing it shall state precisely the *nature and situation* of each of the immovables on which the mortgage is granted."

And we cited the decision in Keiffer vs. Stern, 27 La. An. 272, the leading case on this subject.

A mortgage of a railway and its *appurtenant* property would probably satisfy the above Article. As depots, offices and side tracks were added they would be covered, and would be physically present to the senses of anyone who examined the railroad property.

But, as Judge Pardee shows, a right to certain land grant lands to be earned, selected and then sold, is not appurtenant to a railway, or necessary for its operation. See also United States vs. Harris, 1 Sumner, 31, 37; Harris vs. Elliott, 10 Peters, 53; Linthecum vs. Ray, 9 Wall. 241, 243. The lands are to be sold to settlers. If you wish to mortgage them, you must include them in the description of your mortgage by some words which shall indicate their *nature and situation*. This was not done in the mortgage of 1870. It was, plainly, not intended to be done. It

was not in the mind of the parties. *As to such land grant, then, the mortgage could not legally exist.*

III.

The counsel for appellee Parker are equally mistaken in the third paragraph of their brief as to the question of the authority of Bates to make the mortgage of 1870.

The act of mortgage, executed before a notary and two witnesses, is, by the Code of Louisiana, Art. 2236, "full proof of the *agreement* contained in it against the *contracting parties*, their heirs and assigns, unless it be declared and proved a forgery;" but this provision must receive a rational construction. It implies an agreement made by contracting parties, either appearing themselves in person or by due authority. It makes proof as to what is recited.

Does the counsel from New Orleans mean to say that, if his office clerk should go before a notary and simply declare that he was authorized by the counsel to sell his house, and then proceed to sell it, the authentic act would make full proof of a sale by the counsel himself? The law of Louisiana is not chargeable with such ineptitude. The authentic act of 1870 made proof as to what Bates said. He declared that he was authorized to issue certain bonds, p. 11, and proceeded then to recite that under the authority and instructions of his Company he mortgages and hypothecates certain property.

The authentic act proves that he appeared and made these assertions. We could not object to it. Its effect is another thing. No corporate seal is affixed to it. What proof is there that it is the act and deed of the corporation?

As to the question of registry and reinscription we reply, that the answer raised the issue very fully, p. 32, by express denials, and the point was noticed by the lower Judge. Our opponents

have fallen into a grave error at p. 13 of their brief when they say:

"In addition to the registry in the *Parish of Orleans*, etc."

And again, at p. 37 the error is repeated.

There was no proof whatever of any registry in Orleans Parish, and the answer denied it. See our original brief, pp. 66-70.

We repeat what was there said, and we refer also to Ridings vs. Johnson, 128 U. S. 212, and the authorities there cited by his Honor Mr. Justice Bradley.

IV.

Upon the question of interpretation of this alleged mortgage of 1870, counsel on the other side, at p. 14 of their brief, have fallen into an error in respect to Art. 1957 (1952) of the Code of Louisiana. The description in the mortgage not only does not mention a land grant, but as we submit, excludes such a grant or any lands earned thereunder. To say that in case of doubt the Court will therefore say that the land grant was included, seems a wresting of the scripture of Art. 1957 of the most violent sort. The Article of course applies to a case where an agreement is made as to *some subject*, and being ambiguous is construed against the obligor. But this is only one rule of many. The rule which best applies to this cause is found in Peck vs. Bemiss, 10 La. An. 160, 162, where it is said:

"In the search for the intention of the parties we are to look to the whole language of the instrument, and the surrounding circumstances *to which the instrument itself points.*"

These are almost the words of his Honor Mr. Justice Harlan, in Smith vs. McCulloch, 104 U. S. 25.

At p. 16 of their brief, counsel on the other side have made an error which they will doubtless correct in oral argument, as they cannot wish to mislead the Court. In undertaking to state the

language of the bonds they leave out much of that language, so that its sense is greatly changed. Of course, it is with the description in the mortgage that we are concerned, being third parties under the Code of Louisiana, Art. 3343 (3315), cited in appendix to our original brief. With the exception of an unauthorized reference in the bond to "Act of Congress," the description is nearly that of the mortgage. But, of course, the mortgage controls, and is the only thing which, by its record, can affect third persons. Ridings vs. Johnson, 128 U. S. 212.

Again, at p. 21 of our opponents' brief, we find this statement:

"It is stipulated in [the] mortgage that the Company mortgages all real estate of every kind and description whatsoever and wheresoever situated."

This, if meant to be taken literally, is gravely erroneous. It is part of a sentence in the mortgage and is, in the same clause (transcript, p. 13), limited by the phrase:

"AND which shall be appurtenant to or necessary for the operation of said main line of said railroad or any of said branches connected with the said main line or to be connected therewith."

The argument of our opponents from pages 14 to 18 of their brief, so far as it is founded on assumptions not supported by any proof, does not require any reply. But there is a fact stated in the bill of complaint, p. 9, with partial correctness, which throws much light on the intention of the parties to the mortgage of 1870. It appears that on September 4, 1872, the New Orleans, Baton Rouge and Vicksburg Railroad Company made, to the same trustee, its Land Grant Mortgage to secure a large issue of bonds, under the Act No. 100 of 1872, also pleaded in the bill, and found in the appendix to our original brief, p. 76. The bill states that this mortgage of 1872 was made on "the same property," but this identity of property is denied in the answer and is an error. The presumption

is that a mortgage to secure Land Grant Bonds followed the Statute of 1872, and the statute provides that it shall carry with it a first lien and privilege on "*all lands acquired by Act of Congress or otherwise.*"

Here, in an Act of 1872, is the first legislation which authorized the New Orleans, Baton Rouge and Vicksburg Railroad Company to receive, deal with, and mortgage lands acquired by Act of Congress. And under this legislation a mortgage was made, to secure *Land Grant Bonds* to the amount of $12,000,000, and to the same trustee as the one named in the mortgage of 1870. Transcript, p. 9 and p. 36.

Now, our opponents, as well as the lower Judge, set up an hypothesis that when the mortgage of 1870 was made the Act of Congress of 1871, thereafter adopted, was pending in Congress, and the parties must have intended to include in the description of that mortgage of 1870 the land grant of 1871, and the lands to be thereunder acquired. It seems to us just the other way. Would rational railroad men, and a responsible Trust Company, expecting that a land grant would be made during the next six months, and desiring to include it in a mortgage so that the bonds should have the benefit of such security, compose and agree to such a description as that in the mortgage of 1870? It is impossible to conceive that they should have done so. On the contrary, if the bill was pending, as counsel assume, the very fact shows that when the description in the mortgage of 1870 was prepared, all idea of, or reference to, a land grant was deliberately left out, to be dealt with in the future. And, the Act of Congress of 1871 having been passed, at the next session of the Legislature of Louisiana came the above mentioned Act of 1872, and then the Land Grant Bonds and mortgage of September, 1872. The whole story shows the intention alike of the railroad

language of the bonds they leave out much of that language, so that its sense is greatly changed. Of course, it is with the description in the mortgage that we are concerned, being third parties under the Code of Louisiana, Art. 3343 (3315), cited in appendix to our original brief. With the exception of an unauthorized reference in the bond to "Act of Congress," the description is nearly that of the mortgage. But, of course, the mortgage controls, and is the only thing which, by its record, can affect third persons. Ridings vs. Johnson, 128 U. S. 212.

Again, at p. 21 of our opponents' brief, we find this statement:

"It is stipulated in [the] mortgage that the Company mortgages all real estate of every kind and description whatsoever and wheresoever situated."

This, if meant to be taken literally, is gravely erroneous. It is part of a sentence in the mortgage and is, in the same clause (transcript, p. 13), limited by the phrase:

"AND which shall be appurtenant to or necessary for the operation of said main line of said railroad or any of said branches connected with the said main line or to be connected therewith."

The argument of our opponents from pages 14 to 18 of their brief, so far as it is founded on assumptions not supported by any proof, does not require any reply. But there is a fact stated in the bill of complaint, p. 9, with partial correctness, which throws much light on the intention of the parties to the mortgage of 1870. It appears that on September 4, 1872, the New Orleans, Baton Rouge and Vicksburg Railroad Company made, to the same trustee, its Land Grant Mortgage to secure a large issue of bonds, under the Act No. 100 of 1872, also pleaded in the bill, and found in the appendix to our original brief, p. 76. The bill states that this mortgage of 1872 was made on "the same property," but this identity of property is denied in the answer and is an error. The presumption

is that a mortgage to secure Land Grant Bonds followed the Statute of 1872, and the statute provides that it shall carry with it a first lien and privilege on "*all lands acquired by Act of Congress or otherwise.*"

Here, in an Act of 1872, is the first legislation which authorized the New Orleans, Baton Rouge and Vicksburg Railroad Company to receive, deal with, and mortgage lands acquired by Act of Congress. And under this legislation a mortgage was made, to secure *Land Grant Bonds* to the amount of $12,000,000, and to the same trustee as the one named in the mortgage of 1870. Transcript, p. 9 and p. 36.

Now, our opponents, as well as the lower Judge, set up an hypothesis that when the mortgage of 1870 was made the Act of Congress of 1871, thereafter adopted, was pending in Congress, and the parties must have intended to include in the description of that mortgage of 1870 the land grant of 1871, and the lands to be thereunder acquired. It seems to us just the other way. Would rational railroad men, and a responsible Trust Company, expecting that a land grant would be made during the next six months, and desiring to include it in a mortgage so that the bonds should have the benefit of such security, compose and agree to such a description as that in the mortgage of 1870? It is impossible to conceive that they should have done so. On the contrary, if the bill was pending, as counsel assume, the very fact shows that when the description in the mortgage of 1870 was prepared, all idea of, or reference to, a land grant was deliberately left out, to be dealt with in the future. And, the Act of Congress of 1871 having been passed, at the next session of the Legislature of Louisiana came the above mentioned Act of 1872, and then the Land Grant Bonds and mortgage of September, 1872. The whole story shows the intention alike of the railroad

company, the trustee and the Legislature to have been just the opposite of what our opponents claim it to have been.

The argument of our opponents, pp. 19 to 31, on the meaning of the phrase "appurtenant to or necessary, or used for the operation of the said main line of railroad or any of its branches," seems to us devoid of any logical merit. It is in fact a series of fallacies. It begins with an error as to what we contend. It then proceeds with the singular suggestion that "appurtenant" in Louisiana has a meaning it does not have in the other States, a suggestion which is shown to be mistaken by the very statutes cited in this case by the lower Judge, and printed at pp. 66-67 of our original brief. It then proceeds with a process of ratiocination of this sort: Appurtenant means pertaining to; pertaining to means belonging to; belonging to a main line of railroad or any of its branches means belonging to "the line;" belonging to the line means belonging to the Company; and, *therefore*, the description includes all possible property, real and personal, which then belonged to or was afterwards acquired by the Company, mortgagor! Such fallacies may amuse, but they surely cannot convince. Appurtenant does not mean "belonging to," in the sense in which we say that the steam yacht Alva belongs to Mr. Vanderbilt. On this point we refer again to Humphreys vs. McKissock, 140 U. S. 313, where the phrase is discussed by his Honor Mr. Justice Field; and to Harris vs. Elliott, 10 Peters, at p. 53, in which it was said that land cannot be appurtenant to land, as well as to same case in 1 Sumner, 21, 36, reported as United States vs. Harris.

We may imagine the surprise of Judge Story and Judge Thompson if they could read the brief of our opponents on this subject. So far from the words "appurtenant" or "appurtenance" being unknown to the Civil Law, they come from the Civil Law. See the dissertation of Merlin in his Repertoire, verbo

"*Appartenances*," where it appears that this word means practically the same as "appurtenances;" "ce qui appartient à une *chose*, ce qui en dépend;"—which being translated is, "that which pertains to a *thing*, that which is an appendage to it," and not something that belongs to a person.

However this may be, the Revised Statutes of Louisiana in force in 1870, use the word "appurtenances" in the same sense as it is used in England or the other States of this Union. See sections printed at pp. 66, 67 of our original brief.

We also cite the brief but interesting decision delivered by Mr. Justice FIELD in Linthecum vs. Ray, 9 Wall. 241, 243, where it was said of the right to use a wharf: "It was in no way connected with the *enjoyment or use of the lot*, and a right not thus connected cannot be annexed as an incident to land so as to become appurtenant to it."

The assumption that what is appurtenant to a main line of railroad, or any of its branches, means "what belongs to the Company," involves a double fallacy, firstly, in assuming that "appurtenant" means "belonging to," in a personal and proprietary sense, as Bucephalus belonged to Alexander; and, secondly, that "the Company" is the same as "the main line of railroad or any of its branches." The Code of Louisiana, Art. 435, declares that "corporations are intellectual beings, different and distinct from all the persons who compose them." Chief Justice Marshall thought the same thing when he said that "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." 4 Wheaton, 636. A "main line of railroad, or any of its branches," is something distinctly different from the Company that owns it. The company is an intellectual, a juridical being; the main line of railroad, or any of its branches, is a physical fact, *in esse* or *in posse*. As Mr. Wood says, a railroad, whether main line or branch, is "a road-

way upon which rails are laid, suitable for the passage of vehicles adapted to use them." Wood's Railway Law, §1.

In the new Century Dictionary we find a valuable collection of definitions and citations as follows:

"APPURTENANCE. * * *

"2. That which appertains or belong to some *thing* else; something belonging to another *thing* as principal; an adjunct; an *appendage;* an accessory; * * 'Revolutions upon revolutions each attended by its appurtenance of proscriptions and persecutions and tests.'—*Macauley.*

"3. Specifically, in law, a right, privilege or improvement belonging to a principal property; as a right of pasture in a common attached to an estate; outhouses, gardens, etc., attached to a mansion, and the like."

"APPURTENANT.—I. *a.* Appertaining or belonging; pertaining; *incident or relating to,* as a legal right, interest or property subsidiary to one more valuable or important. Right of way * * appurtenant to land. *Blackstone, Commentaries,* II, 3."

In the case, cited above, of Harris vs. Elliott, 10 Peters, at p. 53, this Court said of the term "appurtenances:"

"This term, both in common parlance and legal acceptation, is used to signify something appertaining to another *thing* as principal, and which passes as an *incident* to the principal *thing.* Lord Coke says (Coke, Lit. 21, 6), a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. According to this rule land cannot be appurtenant to land. In the case of Jackson vs. Hathaway (15 Johns. 454) the Court say that it is impossible to protect the defendant on the ground that the adjoining road passed by the deed as an incident to the lands *professedly granted.* A mere easement may, *without* express words, pass as an incident to the principal object of the grant; but it would be *absurd* to allow the

fee of one piece of land, *not mentioned in the deed*, to pass as *appurtenant* to another distinct parcel, which is expressly granted by precise and definite boundaries."

What this Court has thus characterized as absurd, is just what our opponents are trying to do by their strained interpretation of the description in the mortgage of 1870. They are trying to cause to pass, as appurtenant, vast bodies of land, many of them thirty miles away, which are "not mentioned in the deed."

We cannot find that a single case cited by our opponents or by the lower Judge can justify the interpretation they put on the description in the mortgage of 1870.

In Coe vs. Pennock, 23 Howard, 117, the mortgage was held to include after-acquired rolling stock because rolling stock was described in and covered by the mortgage; Mr. Justice NELSON saying:

"We are satisfied that the mortgage attached to the future acquisitions, *described in it*, from the time they came into existence," p. 130.

In Shaw vs. Bill, 95 U. S. at p. 15, Mr. Justice FIELD said:

"A mortgage by a railroad company which covers, *in the terms of the two mortgages in suit*, its engines, cars and machinery, carries not only the cars, engines and machinery in existence at the date of the mortgage, but such as take their place."

Mr. Justice Field then cites R. R. vs. Woelpper, 64 Pa. State, 366, a leading case in this subject—opinion by Sharswood, J.,—where the question was of a lien on certain rolling stock, etc., admitted to be within "the words of grant of the mortgage." The point decided was that if future acquisitions are to be covered in equity, they must be within the words of the description.

U. S. Trust Co. vs. R. R. Co., 32 Fed. Rep. 480, was a decision as between mortgagor and mortgagee only, under a mortgage of a railroad and all its real estate and appurtenances; and a build-

ing erected by the railroad company for its business as a carrier was held to be appurtenant and included in the description of "all real estate."

Dunham vs. R. R. Co., 1 Wall. 254, was simply a case of a mortgage of a road, built and to be built, and the road as built was held to fall under the dominion of the mortgage, authorized as it was by statute, p. 267.

Pierce vs. Emery, 32 N. H. 484, simply holds that under the special legislation, there discussed at great length, certain iron rails were covered by a mortgage which included a railroad, etc., and all personal property, * * * as the same was then in use or might be changed and renewed; these rails being "incident to the general *subject* of the mortgage and an *accession* to it." So we understand the case.

We do not need, we imagine, to weary this tribunal with longer discussion of cases. We may, however, say that the decision in Calhoun vs. Memphis, etc., R. R., 2d Flippin, 442, is not to be put aside in the manner attempted at p. 23 of appellee's brief.

It is an interesting and sound decision, approved by the Supreme Court of Mississippi, and it was not disapproved by the Supreme Court of Louisiana in Bell's case, 34 An. What the Louisiana Court meant was, that it did not apply to a railroad office building, an accessory and adjunct to the *corpus* of the railroad.

The fact is that the views expressed in Humphreys vs. McKissock, 140 U. S. at pp. 313-314, are conclusive in favor of appellants in this cause. In delivering the decision of this Court, his Honor, Mr. Justice Field, says:

"A thing is appurtenant to something else only when it stands in the relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter. Harris vs. Elliott, 10 Peters, 25, 54; Jackson vs. Hollaway, 15 Johns. 447,

455; Linthecum vs. Ray, 9 Wall. 241. Of two parcels of land one can never be appurtenant to the other, for, though the possession of the one may be greatly to the benefit derived from the other, it is not an incident of the other or essential to the possession of its title or use; one can be enjoyed independently of the other. As said by the Court of Appeals of New York in *Woodhull vs. Rosenthal*, 61 N. Y. 382, 390: 'A thing *appurtenant* is defined to be a thing used with and related to or dependent on a thing more worthy, and agreeing in its nature and quality with the thing whereunto it is *appendant* or appurtenant. It results from this definition that land can never be appurtenant to other land *or pass with it* as belonging to it. * * * All that can be reasonably claimed is that the word appurtenances will carry with it *easements and servitudes* used and enjoyed with the lands for whose benefit they were created. Even an easement will not pass unless it is necessary to the enjoyment of the thing granted.'

"Under the term 'appurtenances' as used in the mortgage in question only such property passes as is indispensable to the use and enjoyment of the franchises of the Company. It does not include property acquired simply because it may prove useful to the Company, and facilitate the discharge of its business. A distinction is made in such cases between what is indispensable to the operation of a railway, and what would be only convenient. Bank vs. Tennessee, 104 U. S. 493."

V.

The brief of our opponents seems to misapprehend the point as to the equities of the New Orleans Pacific Railway Company and its trustees and mortgagees.

And the statement at p. 36 of their brief that, "as a matter of fact, a portion of the road from New Orleans to Baton Rouge,

some sixty miles, was constructed and operated before the New Orleans Pacific Railway Company was organized," is highly erroneous, if it means that the New Orleans, Baton Rouge and Vicksburg R. R. Co. built that sixty miles. That Company never built or acquired one foot of railroad. The sixty miles referred to were built by another Company, and the story is told in State vs. Graham, 23 La. An. 622.

The point of our contention under this head is, briefly, that the New Orleans Pacific Railway Company built the railroad by which the lands were earned, made thus the first definite location, paid the fees, and obtained the legal title from the United States to the lands in question in this cause. If it be elementary that where equities are equal the legal title must prevail, *a fortiori*, when we have both legal title and all the equities besides, and the New Orleans, Baton Rouge and Vicksburg Railroad Company have no equities at all that anyone ever heard of, we submit that we must prevail.

Again, at p. 36 of their brief, our opponents are highly inaccurate in their attempt to show that the New Orleans, Baton Rouge and Vicksburg Railroad Company on November 11, 1871, made such a location of a railroad as to bring their case within the rule in the cases they cite from 92 U. S. 733; 21 Wall. 60; 97 U. S. 496.

The only allegation and proof in the cause is that the mortgagor of 1870 filed in November, 1871, a map of general route. It never made a survey, it never made any definite location. The grant never attached to any specific lands. The definite location and building of the road, whereby the lands were earned, and whereby the title acquired precision and attached to any specific lands, were the work and at the cost of the New Orleans Pacific Railway Company, and the line thus located and constructed was *not the same* as that projected by the map of general

route of November, 1871. Be pleased to look at the map between pp. 96 and 97 of the transcript. The general route is delineated in *black*, the New Orleans Pacific Railway, as built, in *yellow*. At hardly any point do they coincide, at many points they are from six to twelve miles apart. The township lines afford a scale of measurement. How could any title have acquired precision by the filing of that map of general route? The granted limits, the indemnity limits, and the specific sections calculated from this general route of 1871 are necessarily far different from those determined and made precise by the definite location of 1881 and 1882, and by the selections and patents. Do counsel seriously contend that by the filing in 1871, of a general route drawn with a pen on a township map of Louisiana, a title of the New Orleans, Baton Rouge and Vicksburg Railroad Company attached to the lands related to and measured by the definite location of New Orleans Pacific Railway made by its construction in 1881 and 1882? We trow not. Until 1881 and 1882, the grant was a float. See U. S. vs. R. R., 141 U. S. 359, 371. A reference to the selections in the manuscript record in case at bar, will show that about one-third of the lands selected by and patented to the New Orleans Pacific were selected and approved in the indemnity limits. To diminish the bulk of the printed transcript, these selections were not printed, but it is stipulated that they may be referred to by either party. Is it seriously contended that, under the above decision, 141 U. S. 371, any title vested in the New Orleans, Baton Rouge and Vicksburg Railroad Company, in 1871 as to lands in the indemnity limits? Yet the decrees appealed from deal with these lands as if title vested in 1871.

The more the facts are examined the more clearly is it seen that the decrees we complain of are erroneous.

Our opponents continually claim that the mortgage of 1870

attached to the lands in question as after-acquired property, and yet it is clear that the mortgagor of 1870 never *acquired* the lands here in question at all. They lay stress on the fact that the patents are to the New Orleans Pacific Railway Company as assignee, but this phrase is matter of description. The habendum clause shows this.

VI.

To the observations of opposite counsel on the Act of Congress of February 8, 1887, we reply:

It is not averred or claimed in the bill of complaint that the New Orleans, Baton Rouge and Vicksburg Railroad Company ever even surveyed a route, or ever built any railroad of any sort. It never built any road at all. Its map of "general route" was simply a project. The five years limited by Act of Congress of March 3, 1871, had long passed. Nearly ten years had passed when the rights of that Company, in the land grant, were assigned and reliquished to the New Orleans Pacific Company.

The Act of 1887 deliberately forfeited a large quantity of the grant—and restored the lands to the public domain. The second section enacts as follows, Transcript, p. 93: "That the title of the *United States and* of the original grantee to the lands granted by said Act of Congress of March 3d, 1871, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed, and confirmed to the New Orleans Pacific Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior, October 27th, 1881 (and November 17th, 1882), which indicate *the definite location of said road:* Provided, that all said lands occupied by actual settlers at the date of the *definite location* of said road and still remaining in their possession or in possession of their assigns or heirs, shall be held and deemed

excepted from said grant, and shall be subject to entry under the public land laws of the United States."

It thus appears that Congress fixed the definite location to be October 27th, 1881, and November 17th, 1882, and it excepted all lands occupied by actual settlers at that date.

Section 3d required that the relinquishment and confirmation of lands in the Act provided for shall take effect upon the acceptance of the Act by the New Orleans Pacific. That acceptance was made and filed with the Secretary of the Interior April 20th, 1887 (see Record, p. 95).

Section 4th makes it the duty of the Secretary of the Interior in issuing patents "to protect the settlers upon said lands and to give binding force and effect to the Blanchard-Robinson agreement made with the New Orleans Pacific Company on the 4th day of January, 1882, and filed in the office of the Secretary of the Interior, by which agreement settlers had a right to buy lands from the New Orleans Pacific Company at two dollars per acre, on terms of credit.

Section 5th empowers the Secretary of the Interior to make all needful rules and regulations to carry the Act into effect.

Section 6th declares that the patents for the lands conveyed already issued—meaning thereby the lands patented March 3d, 1885, now in question—are confirmed, but subject to the provisions of this Act to protect any and all settlers in all their rights under the said Sections of this Act.

The rules and regulations promulgated by the Secretary of the Interior to carry out this Act to protect settlers are reprinted in the Record at pp. 94-96.

The Blanchard-Robinson agreement (dated Jan. 4th, 1882), referred to in the Act of February 8th, 1887, as on file in the office of the Secretary of the Interior, although not printed in the Record, was before Congress at the date of this Act and is part of it.

The text of that agreement, made part of the Act, is to be found at pp. 92, 93, Senate Executive Documents No. 31, 48th Congress, 1st Session, and also House of Representatives Document, 49th Congress, 1st Session, to accompany House Bill 3186.

The all-pervading purpose of Congress in the Act of February 8th, 1887, was to protect the numerous actual settlers. This particularly appears in Sections 2d, 4th, 5th and 6th. Under the provisions of the said Act the duty was enjoined on the Secretary of the Interior "to protect settlers upon the said lands and to give binding force and effect to the Blanchard-Robinson agreement." It was intended that this should be done as shown in said Section 4th, "on the payment" by the said settlers "to *said Company* (The New Orleans Pacific), in lawful money of the United States, at the rate of two dollars per acre, for the lands so occupied, at one-third cash and balance in such equal annual installments as the Secretary of the Interior shall prescribe." These regulations are prescribed under date of June 6th, 1887 (Record, pp. 94 96). The Secretary of the Interior thus ordains as to the rights of settlers, both under Section 2d and Section 4th.

"In all cases under Section 2d, where the right of entry under the laws of the United States shall have been fully established to lands which have been patented to the Company, the latter will be required to re-convey such lands to the United States, to the end that no cloud may rest upon the title of the entryman.

"In cases where the right of purchase under the Fourth Section of the Act shall be established, the railroad company will be required to convey the land to the applicants upon the receipt of the first payments and secure itself for the deferred payments by liens upon the land sold, or to enter into such contracts to convey the lands upon the receipt of the final installment paid

in the manner below described as will be satisfactory to this office." Transcript, pp. 95, 96.

It thus appears that where lands had been actually patented but were occupied by actual settlers, the Company was required by the Act and executive regulations to reconvey the same to the United States, to the end that no cloud might rest upon the title of the entryman. The lands coming under the Blanchard-Robinson Agreement and not patented were, by this Act of February 8th, 1887, regranted and confirmed to the New Orleans Pacific Railway Company. And the Railroad Company was required to convey the lands to the settlers on receipt of the purchase money.

This shows unmistakably that Congress regarded the complete, unincumbered title and right to be in the New Orleans Pacific. That Company has conveyed many lots of these lands under the Blanchard-Robinson Agreement. Now, if the plaintiff's contention is right, and if the decrees below are right, these lands are subject to the assumed lien of the mortgage of 1870, and may be sold under the decrees and title of the settlers defeated. The title of the settlers by the Act of Congress comes from the New Orleans Pacific, and their right is assured by that Act. We, therefore, see the deep and profound significance of the language of the Second Section of the Act of February 8th, 1887, when it enacts "that the title of the *United States, and* of the original grantee * * * is relinquished, granted, conveyed and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company."

What was the title of the United States as against the New Orleans, Baton Rouge and Vicksburg Company? We have shown therefore that, because of the failure of that Company to make any definite location of the road, its fail-

ure to build any road, its failure to pay the costs of surveying,—it had no title. The title was therefore free and clear of all liens in the United States, and the same free and absolute title that was in the United States it granted by this Act to the New Orleans Pacific Company.

What was the title of the United States on the 8th of January, 1887, as against the New Orleans, Baton Rouge and Vicksburg Railroad Company? That is settled by this Court in the case of the New Orleans Pacific Railway Company vs. The United States, 124 U. S. 124. The Court there, after referring to the failure on the part either of the Backbone Company or the New Orleans Pacific, to commence or complete the work within the time fixed by the Act of Congress making the grant, say:

"But we are of opinion that, while on the failure of the Company to complete its road within the time limited, Congress might adopt measures to secure its speedy completion, no limitation was imposed on the right and power of Congress, the Company having failed even to commence the construction of any part of its road within the time limited, to virtually renew the grant and extend the time within which the land might be earned, with the imposition of a new condition, that, before any patent should be issued, the cost of surveying the land patented should first be paid into the treasury."

And more to the same effect.

After citing the case of Farnsworth vs. Minnesota and Pacific Railroad Company, 92 U. S. 49, to the effect that a forfeiture upon failure to perform the work within the prescribed time might be declared, as well by Legislative Act as by judicial decree, the Court proceeds in substance to state that in the case then before it Congress was left entirely free to deal with the land grant as it might see fit. And, accordingly in this case, Congress did deal with it by granting to the New Orleans Pacific,

not only the title of the United States, but that of the original grantee.

It may be said, however, that the Congress made this grant to the New Orleans Pacific as "the assignee" of the New Orleans, Baton Rouge and Vicksburg Railroad Company. These are words of mere description and were not intended to declare that the New Orleans Pacific took the lands subject to any liens which that other Company might have attempted to create thereon.

Clearly the title was granted to the New Orleans Pacific and vested in it. The title of the United States at the time of the passage of the Act of February 8th, 1887, was not subject to any lien attempted to be created by the Backbone Company, and the whole scope and purpose of the Act of 1887 show that it was not intended to recognize any rights in the original grantee, since the provisions in favor of settlers before referred to, are inconsistent with any such view, and since it grants and confirms to the New Orleans Pacific the title of the United States and of the original grantee.

The New Orleans Pacific Company rests both upon its equity arising out of having earned the land, and upon the distinct grant made for the first time by the Act of 1887.

There can be no doubt that the Act of Congress vested the title to these lands in the New Orleans Pacific. These lands could have been subjected to this mortgage of 1870, only in one of two ways: First, either by reason of some personal agreement of the New Orleans Pacific Company, such as its being the successor of the New Orleans, Baton Rouge and Vicksburg Company. It was not such successor, but was a new and independent Company, and never made any contract by which it agreed to assume the obligations of the other Company in respect of these lands. The deed of that

other Company to the New Orleans Pacific, of January 5th, 1881, appears in the Record at page 43. It is simply a quit-claim of all of the right, title and interest of, in and to a certain grant of of public lands by Act of Congress of March 3d, 1871. It contains no covenant of any description whatever.

The only other way in which these lands could have been subjected to the lien of its mortgage of 1870, supposing for the sake of argument only, that they are included in the description of that paper, would have been by reason of the title having been in the New Orleans, Baton Rouge and Vicksburg Company, and having thus become subject to the mortgage as after-acquired property. But, as we have seen, the title never vested in the mortgagor of 1870, and, consequently, was not in this way made subject to the mortgage.

The only way in which the purpose of Congress in the passage of the Act of February 8th, 1887, can be carried out is to treat it as practically a forfeiture of all rights of the mortgagor of 1870, and a regranting of the lands to the New Orleans Pacific. In no other way can the settlers be protected; and if these settlers stand free from the alleged hypothecation in 1870, so equally does the New Orleans Pacific. The two titles necessarily stand or fall together.

VII.

Our opponents do not seem to understand our point as to laches. The argument of the lower Judge in his opinion as well as of the appellees, in a large part of the brief, is a labored effort to show some equity on their side with reference to this land grant, by which it can be drawn into and covered by the mortgage of 1870. Yet the bondholders, who claim to be secured by that instrument, stood by for over fifteen years, during which they were notified thirty times by a defaulted coupon that whatever rights they had were not being enforced. They stood by in

silence while the New Orleans Pacific Company, at vast expense, earned the lands, selected them, mortgaged them, paid large fees, obtained patents, and paid large taxes. We deny any equity in the appellees, but if any they have, it seems fair to say that they have slept upon it, and that they cannot be allowed to enrich themselves at our expense.

CONCERNING THE MOTION TO DISMISS.

The motion made by counsel of Parker to dismiss the appeal, as to himself only, was postponed to the merits. We submit that this cause belongs to the class catalogued in the opinion in Gibson vs. Schufeldt, 122 U. S., at p. 38, where appeals have not been dismissed by this Court; and in addition to the cases we have already cited in our brief, filed on the motion, we refer to Friend vs. Wise, 111 U. S. 797.

We submit that where a number of plaintiffs claiming under the same title, or having a common interest in the relief sought, unite in a suit, action or proceeding, their united interests, at least, constitute the matter in dispute.

Shields vs. Thomas, 17 How. 3.

Market Co. vs. Hoffman, 101 U. S. 112.

Davies vs. Corbin, 112 U. S. 36.

Estes vs. Gunter, 121 U. S. 183 and 185.

And where a suit is brought by one for himself and all others, of a class similarly situated, the amount in dispute is, at least, the aggregate interest of plaintiff and of one who joins.

In Bruce vs. R. R., 117 U. S. 514, it was said that the matter in dispute was the right of two bondholders, complainants—that is, their *aggregate* right.

As to the effect of the cross-bill on appealability, see Lovell vs. Cragen, 136 U. S. 130, 142.

We contend that the matter in dispute in this cause is the

amount of the alleged mortgage of 1870 as a lien set up and controverted.

SUMMARY.

We sum up our more salient points as follows:

(1) On the 1st October, 1870, there was no law of Louisiana, general or special, which authorized the alleged mortgagor of that date to mortgage the land grant of 1871, or lands to be earned thereunder.

C. C. 3307 (3276).

Voorhies vs. DeBlanc, 12 An. 864.

Rev. Stat. of 1870, Sec. 726.

N. O. P. Ry. Co. vs. Union Tr. Co., 41 Fed. Rep. 717.

Act 143 of 1869, Sec. 16.

The only legal power of the alleged mortgagor, at that time, was to mortgage its railways with such property as might become *appurtenant to or necessary for* the operation of the railroad, whether owned by the Company at the date of the mortgage or acquired by it thereafter; and the land grant of 1871, even if susceptible of mortgage, as such, was not appurtenant to or necessary for the operation of a railroad.

U. S. vs. Harris, 1 Sumner, 37.

Harris vs. Elliott, 10 Peters, 25.

Tucker vs. Ferguson, 22 Wall. 527.

Wilson vs. Bryce, 92 U. S. 320.

Alabama vs. Montague, 117 U. S. 602.

Linthecum vs. Ray, 9 Wall 241.

Humphreys vs. McKissock, 140 U. S. 304, and especially the exposition by the learned organ of the Court at pp. 313, 314.

(2) Even if the instrument of October 1st, 1870, was the authorized act and deed of the alleged mortgagor of 1870, which is

denied, and a land grant could have been hypothecated by it as after-acquired property, yet the land grant of 1871 was not mentioned or included in, or covered by the description in that mortgage, nor were any of the lands in question even remotely alluded to.

(*a*) Neither this land grant nor the lands to be earned thereunder can be held to be covered or affected by a mortgage of 1870 of a railroad and all real and personal estate owned by the railroad company or to be acquired, appurtenant to or necessary or used for the operation of the main line or any of its branches.

See authorities above cited; and also

R. R. vs. Livermore, 64 Pa. St. 435.

Dinsmore vs. R. R., 12 Wis. 649.

Farmers, etc. Co. vs. Carey, 13 Wis. 119.

Buck vs. Memphis, etc. R. R., 4 Cent. Law Jour. 430.

Farmer's, etc. Co. vs. Bank, 11 Wis. 267.

Welsh vs. Barton, 24 Ohio St. 28.

Calhoun vs. Memphis, etc. R. R., 2 Flippin, 442.

Miss. Valley vs. Chicago, etc., 2 Am. and Eng. R.R. Cases, 414.

Boston, etc., Co. vs. Coffin, 12 Am. and Eng. R.R. Cases, 375.

Mobile, etc. R. R. vs. Moseley, 52 Miss. 127.

Tennessee vs. Whitworth, 117 U. S. 188.

(*b*) The mortgage contained no statement of the "nature and situation" of any such immovable as a land grant or lands to be earned thereunder, and, as to such immovable or immovables, was inoperative, and also incapable of recordation in such a way as to notify or affect third persons.

Civil Code, 3306 (3273).

Keiffer vs. Stern, 27 La. An. 282.

(*c*) The alleged mortgage of 1870 contained no provision for the administration of a land grant, or lands to be acquired thereunder.

(*d*) The Louisiana Statute, No. 100 of 1872, and the Land Grant Mortgage of September 4th, 1872, made by the same mortgagor to the same mortgagee, exhibit the common understanding of the mortgagor, mortgagee and legislator alike, that no Land Grant Mortgage had been made in 1870, or contemplated. See Transcript, pp. 9 and 36.

(*e*) The alleged mortgagor of 1870 never made any survey or definite location of a railroad, never built any road, never selected any lands, or paid any fees, Even if the land grant and lands could have been mortgaged in 1870, as after-acquired property, and can be gathered into the description of the instrument, no lands were ever *acquired* by the mortgagor of 1870. The New Orleans Pacific Railway Company made the only and first definite location of a railroad in 1881, 1882, selected the lands, paid the fees, and the lands were patented to it in 1885. Its route of definite location did not coincide in many places, by many miles, with the projected " general route " filed in 1871 by the mortgagor of 1870, and the lands selected and patented were not the same that would have been earned by the mortgagor of 1870, if it had built on its projected route. At the date of definite location in 1881-2, as to lands in the granted limits, and at date of selection in the indemnity limits, the land grant, theretofore a float, attached to the specific sections, and the title proceeded to and vested in the New Orleans Pacific Company, and not to and in the mortgagor of 1870.

N. O. P. Co. vs. U. S., 124 U. S. 124.

U. S. vs. Railway, 141 *Id.* 358.

(*f*) To include the land grant in the mortgage of 1870 would be to violate the letter and spirit of the Act of Congress of March 3d, 1871. It is impossible to conceive that the grant would have been made if it was to fall under the cloud of the mortgage of 1870. Moreover, the 22d Section of the Act of 1871, read with

the 11th Section, show that Congress never intended that this land grant, if mortgaged, should be mortgaged to build a line from New Orleans to Vicksburg on the east side of the Mississippi River.

(3) Under the provisions of the Act of Congress of February 8th, 1887, the title of the United States and of the original grantee of 1871 were conveyed and confirmed to the New Orleans Pacific Railway Company, and in no other point of view can the purposes of the Act of 1887 be accomplished and the rights of the settlers protected as provided by that Act.

(4) Mortgages in Louisiana are *stricti juris;* Civil Code, 3283, (3250); Succession of De Armas, 3 Robinson La. 342; State vs. R. R., 3 Rob. 518; and can in nowise affect third persons except by recordation in the parish where the property is situate, and must be reinscribed within ten years as to third persons.

Civil Code, 3346 (3318), 3347 (3319), 3369 (3333); Ridings vs. Johnson, 128 U. S. 212; Bondurant vs. Watson, 103 U. S. 281; Vance vs. Vance, 108 U. S. 514, and authorities therein cited. See our original brief on this subject, pp. 66-70, and its appendix, pp. 80-81.

The provisions of R. S. of La. 726, 727, 2396, 2397, do not apply to this case, as to reinscription; see argument in original brief, pp. 66 to 70. Nor is there any proof of recordation in the Parish of Orleans, the domicile of the mortgagor of 1870. And furthermore, the mortgage of 1870 was never recorded prior to record of appellants' mortgage save in four of the thirteen parishes mentioned in the bill. See tables at pp. 69 and 70 of our original brief, and never re-inscribed at all.

(5) The cross-bill should not have been dismissed, but should have been passed upon on its merits and a decree made as prayed for.

Kernochan vs. Christie, 11 Wheaton, 446.

(J.) The mortgagor of 1870 never built any road to which anything could be appurtenant.

Peay vs. Schenk, Woolworth's Rep. 175.

Ayers vs. Carver, 17 Howard, 695.

And especially should it not have been dismissed *in toto*, on a demurrer of Parker, joined in by Hamlin.

(6) Even if the bondholders, claiming security under the mortgage of 1870, have some equity as to the land grant (which is denied), they slept on their rights for over fifteen years, and such equity cannot be now set up against the combined legal title and equities of the appellants.

(7) The decrees made by the lower Judge, against our protest, are irregular, defective, illegal and anomalous. They do not pretend to enforce the mortgage of 1870 by its description or in any manner known to equity. They are contradictory and inequitable. They provide for the claims of no one but Parker and Hamlin, and do not provide properly for them. They make no account of the large sums expended by the New Orleans Pacific for construction, fees and taxes. They ignore all the equities of appellants. See our original brief, pp. 35, 36, and Civil Code, 3282, in appendix to that brief, p. 79.

Respectfully submitted,

W. W. HOWE,
JOHN F. DILLON,
WAGER SWAYNE,
For Appellants.

DECEMBER, 1891.

These selections appear to have been made in December, 1883, and must have been approved between that period and March 3, 1885.

The following is a summary from these lists:

Natchitoches district:

Granted limits	295,162.33 acres.	
Indemnity limits		169,812.05 acres.

New Orleans district:

Granted limits	149,272.80 "	
Indemnity limits		65,040.46 "
	444,435.13 "	234,852.51 "

Grand total:

Granted limits	444,435.13 "
Indemnity limits	234,852.51 "
	679,287.64 "

It is thus seen that 234,852.51 acres of the lands in question were selected by the New Orleans Pacific Railway Company in the indemnity limits in the latter part of the year 1883, and thereafter approved to it, and patented to it March 3, 1885. (See U. S. *vs.* R. R., 141 U. S., 359, 371.)

Respectfully submitted.

W. W. HOWE,
JOHN F. DILLON,
WAGER SWAYNE,
Of Counsel.

No. 137.

ADDENDUM TO REPLY BRIEF OF APPELLANTS.

The lists of selections by the New Orleans Pacific Railway Company involved in this case were [redacted] by complainants, and are found from pages 41 to 102 of the manuscript transcript. They were omitted from the printed copies to save needless expense and to reduce the bulk of the printed record, but it was agreed that either party might refer to them.

They consist of four lists, two in each land district of the State of Louisiana.

List No. 1 is in granted limits, New Orleans district, manuscript pages 41 to 54, and embraces 149,272.80 acres; approved to New Orleans Pacific Railway Company, and patented to said company March 3, 1885.

List No. 2 is of lands in *indemnity* limits, manuscript pages 56 to 64, and embraces 65,040.46 acres selected by New Orleans Pacific Railway Company, and patented to it March 3, 1885.

List No. 3 is of lands in *indemnity* limits, Natchitoches district, selected by New Orleans Pacific Railway Company, and patented to it March 3, 1885, and embraces 169,811.85 acres (pp. 64–77, M S.).

List No. 4 is of land in Natchitoches district, granted limits, selected by the New Orleans Pacific Railway Company, and patented to it March 3, 1885. It embraces 295,071.33 acres (MS., pp. 77 to 102).

over